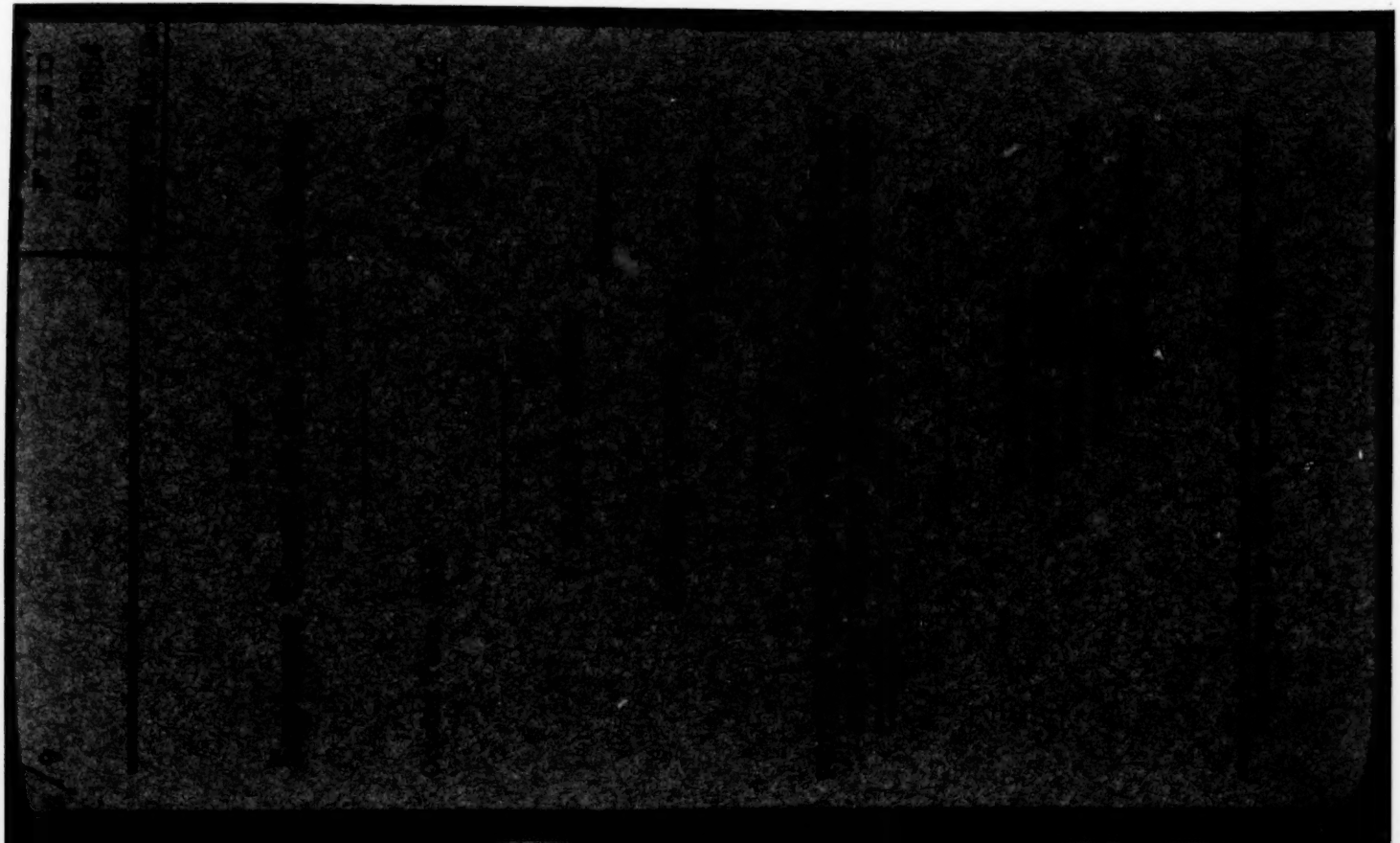

INDEX

PETITION:	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2, 3
Statutes and Federal Rule of Civil Procedure	3
Statement of the Case	4
Reasons Relied Upon for Allowance of the Writ	6, 7
Argument	7
Conclusion	16

APPENDIX:

Opinion of the Court of Appeals for the Third Circuit	18
Opinion of the District Court Sur Re-Argument	25
Opinion of the District Court After Re-Argument	27, 28
Judgment of the Court of Appeals	28
Pertinent Provisions of Title II of the Railway Labor Act	29, 30

TABLE OF CASES CITED

PAGE

Citizens Trust and Surety Co. v. Howell, 119 Pa. Superior Ct. 255 8

Edwards v. Capital Air Lines, 176 F. 2nd 755 7
Erie R. Co. v. Tompkins, 304 U. S. 64 .....7, 10

Glenolden Coal Co. v. Unemployment Compensation Board, 168 Pa. Superior Ct. 534 9

Kennedy v. Silas Mason Co., 334 U. S. 249 .....7, 15

Lodge No. 19 v. Svi Sveti, 323 Pa. 292 8

Moore v. Illinois Central R. Co., 312 U. S. 630 .....7, 10

Seaboard Surety Co. v. Commonwealth, 345 Pa. 147 .. 14
Slocum v. Delaware L. & W. Co., 339 U. S. 239 .....7, 11

Transcontinental and Western Air, Inc. v. Koppal, 345 U. S. 630 .....7, 10

TABLE OF STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE CITED

28 U. S. C. §1254(1) 2

Title II, Railway Labor Act, 49 Stat. 1189, 45 U. S. C. §181 et seq. 3, 7, 11, 29, 30

Federal Rules of Civil Procedure 3, 14

OTHER AUTHORITIES

Bender's Federal Practice Manual 16

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1954. No.

J. STANLEY BOWER,

Petitioner,

vs.

EASTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, J. Stanley Bower, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered June 21, 1954 affirming summary judgment for defendant on the pleadings.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania has not yet been reported. The opinion of the Court of Appeals affirming the judgment of the District Court has not yet been reported. The opinions of the District Court and the Court of Appeals are set forth in the appendix herein at pages 17-28 inc.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 21, 1954 (appendix p. 28). The jurisdiction of this Court is invoked under the Act of June 25, 1948; 62 Stat. 928; 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act the District Court is bound to apply the State law which requires that the procedures provided by the contract for the settlement of disputes must be exhausted before redress can be obtained in Court.

2. Whether in such case a discharged employee who utilized the administrative procedures provided in a collective

bargaining agreement between a carrier and the employees union to obtain reinstatement is barred by such election from maintaining an action for damages for wrongful discharge.

3. Whether the decision of the System Board of Adjustment which is declared to be final and binding in the collective bargaining agreement is subject to judicial review upon a showing that the decision was irregular and lacking in fairness and impartiality.

4. Whether Rule 56 of the Rules of Civil Procedure enjoins the Court from entering summary judgment for defendant on the pleadings where the Complaint and supporting affidavits establish issues of fact to sustain the action.

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

The pertinent provisions of Title 11 Railway Labor Act 49 Stat. 1189, 45 U. S. C. Secs. 181 et seq. are printed in Appendix infra pp. 29, 30.

Rule 56 (c) of Rules of Civil procedure provides as follows:

> "Motion and Proceedings thereon: The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law * * *"

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of Pennsylvania, and defendant a Delaware corporation. Suit for damages of $23,975.00 for wrongful discharge was brought in the District Court of the Eastern District of Pennsylvania at Philadelphia.

Plaintiff, a qualified aviator, had been employed by Eastern Air Lines, Inc., a commercial air carrier, since October 15, 1941. The terms and conditions of his employment were governed by a collective bargaining agreement entered into between Defendant and an air line Pilot's Association as the employee's representative, pursuant to the Railway Labor Act as amended by the Act of 1936, 49 Stat., 1189, 45 U. S. C., Sec. 181, et seq.

On June 2, 1950 plaintiff received a letter from Eastern Air Lines, Inc. dated May 29, 1950 advising that he was dismissed as a pilot and employee effective May 19, 1950. This notice assigned no reasons or charges for said dismissal.

Sections 29 and 30 of the collective bargaining agreement provided the terms and procedures governing discipline and dismissal of pilots (appellant's appendix below 5a-9a, incl.). Section 29, paragraph 2 of said agreement authorized the company to hold a pilot out of service pending investigation and discipline, and it required the company to furnish the pilot with a copy of written charges with expeditiousness, not exceeding seven days. No such charges were given Petitioner until January 12, 1951—over seven months after dismissal (appellant's appendix below 15a).

There were many other procedural violations during the administrative proceedings, and although Petitioner contended before the System Board of Adjustment that his dismissal was irregular and violative of the terms of the contract, the System Board arbitrarily refused to rule upon

this issue (appellant's appendix below 13a). At the hearings the company assigned as reason for dismissal the fact that Petitioner from time to time borrowed money from the company by way of advances against his salary. All of these loan transactions were repaid and no dispute or controversy existed in relation thereto at the time of his discharge (appellant's appendix below 23a).

The company also assigned as charges the fact that petitioner fraudulently borrowed money from other employees. No witness appeared at the hearings to so testify and no fraud was proven (appellant's appendix below 18a). The company also assigned as charges two grounds which were non-existent during May of 1950. These involved the alleged refusal of the Bonding Company to renew the pilot's bond of petitioner and the fact that a month and a half after dismissal Petitioner was indicted. At the hearing before the System Board of Adjustment objection was raised to the irregularity and impropriety of the charges and proceedings but to no avail (appellant's appendix below 30a, 31a).

Notwithstanding, the System Board rendered a decision in which the Board found that the company was justified in discharging Captain Bower. The Board made no findings of fact to indicate what, if any, grounds were adopted by it and, inasmuch as no legal safeguards were provided at any stage of the administrative procedures, it may be reasonably assumed that the Board adopted or was influenced by the two charges which related to occurrences subsequent to the discharge.

The impartiality of the company representatives who presided at the proceedings was seriously impeached. This record shows that Captain Halliburton, designated as the Junior Hearing Officer, was the same company official who authorized the dismissal (appellant's appendix below 22a, 25a). Captain Shannon, the Chairman of the System Board, was the top level official who approved the discharge in the first instance (appellant's appendix below 27a). Petitioner

was represented by counsel throughout and objections were made to hearsay and other incompetent testimony, but the objections were unavailing. In answer to said objections, petitioner and his counsel were told that it was not a legal proceeding and that they could make their objections "so that when this does reach a legal level, if it does, it can be handled in the proper manner" (appellant's appendix below 21a).

Aggrieved by such unfair consideration of his efforts to obtain reinstatement petitioner instituted an action in the district court for damages for wrongful breach of contract of employment. The district court, on defendant's motion for a judgment on the pleadings on June 22, 1953, denied defendant's motion. On July 1, 1953 defendant filed a motion "for a new trial with respect to motion for summary judgment." After argument, on October 30, 1950, the Court withdrew the original opinion and allowed either side to offer the transcript of the administrative proceedings whereupon defendant filed three volumes of transcript.

On November 23, 1953 the Court entered judgment in favor of the defendant on the pleadings. The district court decided, as shown by the opinion filed, that it would examine the record merely to ascertain whether petitioner was given a hearing and whether evidence was received and considered by the Board. Chief Judge Kirkpatrick refused to review the record on the merits. The court of appeals decided that such limited review was proper.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The failure of the Court below to apply the local law of Pennsylvania in a diversity action is in conflict with the decisions of this Court in *Transcontinental Air, Inc. vs.*

Koppal, 345 U. S. 630, *Moore vs. Illinois Central R. Co.,* 312 U. S. 630, and *Erie R. Co. vs. Tompkins,* 304 U. S. 64.

2. The Court below, in deciding that the action of a system board of adjustment created under a collective bargaining agreement is not subject to judicial review on the merits, is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Edwards vs. Capital Air Lines,* 176 F. 2d 755, which held that the decisions of such tribunals are subject to judicial review. This question has never been decided but should be decided by this Court because of its importance in the settlement of labor disputes under the Railway Labor Act.

3. The decision of Court below in granting summary judgment, although there were genuine issues of fact, marked a departure from settled judicial practice as established by the decision of this Court in *Kennedy vs. Silas Mason Co.,* 334 U. S. 249, and decisions of the court of appeals in the several circuits.

ARGUMENT.

1. The result reached below was contrary to the decisions of the Court in the Koppal and Moore cases.

Title 11 of the Railway Labor Act, as amended by the Act of May 10, 1936, 49 Stat. 1189 in Section 204 required that certain disputes between common carriers by air and their employees be handled in the usual manner up to and including the chief operating officer of the Company designated to handle such disputes but if an adjustment cannot be reached the parties could refer the dispute to an appropriate adjustment board chosen by the carrier and the employees acting through their designated representative.

A collective bargaining contract was entered into between the company and the employee's union whereunder administrative procedures were established to decide disputes and grievances. Upon his dismissal petitioner utilized these administrative procedures to obtain reinstatement of his job and the decision of the Board was adverse. Petitioner instituted a diversity action for damages for wrongful discharge in the District Court at Philadelphia. The Court entered summary judgment on the ground that it was bound by the decision of the Board and that the Court had no jurisdiction to judicially review the action of the Board.

Under Pennsylvania law a party is bound to exhaust the remedy provided by the contract before redress can be obtained in Court. The Court below failed to apply the Pennsylvania law. The following appellate decisions indicate the Pennsylvania law on this subject.

In *Citizens Trust and Surety Co. vs. Howell,* 19 Pa. Superior Ct. 255, 264, the Court stated:

> "If the parties to a contract provide that any dispute which may rise between them, in reference to the subject matter of the contract shall be determined by a person therein named, whose decision shall be final, the parties cannot seek redress elsewhere until the person so chosen has been discharged by having made an award or otherwise."

This principle has been frequently applied to fraternal associations where the by-laws and constitution provide procedures whereunder disputes may be settled. The principle is discussed in *Lodge No. 19 vs. Svi Sveti,* 323 Pa. 292, 294, as follows:

> "It is a settled principle that the remedies afforded by the by-laws of an association must be completely exhausted before the aid of a Court can be invoked to settle an internal dispute * * *"

In *Glenolden Coal Co. vs. Unemployment Compensation Board,* 168 Pa. Superior Ct. 534 (1951) in considering the right of an employee, whose contract of employment was breached by the employer, to recover unemployment compensation benefits the Court said (p. 536):

> "Obviously, if there was such an agreement and if claimant was included in its terms, as he claims, appellant violated and breached the agreement by refusing to employ him during the memorial period. Claimant's remedy, then, is provided by the agreement which, as we understand it, consists of a proceeding before a conciliation board and an umpire. An employe, who has a contract with his employer for a definite period or for work during specified periods and whose contract is breached by his employer must pursue the remedies provided by the contract, and is not entitled to unemployment compensation. His claim is for the wages stipulated in the contract, or for damages for its breach, not for unemployment benefits."

In the instant case the Court of Appeals failed to apply the substantive law of Pennsylvania which required the exhaustion of the contract remedy as a prerequisite to redress in Court action. The Court below sweepingly disposed of this important question as follows (appendix p. 22):

> "We have not overlooked plaintiff's contention that under Transcontinental & Western Air v. Koppal, 1953, 345 U. S. 653, his submission to the System Board of Adjustment was a legal prerequisite to the maintenance of the present action at law rather than a freely chosen alternative procedure. We understand that case differently. It, like Moore v. Illinois Central Railroad, 1941, 312 U. S. 630, with which its holding is explicitly squared, merely recognizes the duty of a federal court in a diversity action for wrongful termination of employment to require the plaintiff to show whatever ex-

haustion of administrative remedy may be prerequisite to suit under the procedural law of the forum.

In the present case nothing has been pointed out to us and we have found nothing to suggest that in Pennsylvania a suit for wrongful termination of employment must be preceded by any administrative procedure beyond an unqualified dismissal that is no further reviewable within the employer's organization."

This Court in *Moore vs. Illinois Central R. Co.*, 312 U. S. 630, 634, held that the Railway Labor Act did not purport "to take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in Court" where no such requirement existed under applicable local law.

Inasmuch as Mississippi law governing in that case imposed no requirement to first exhaust the administrative remedy, suit in the first instance was permissible. The Moore decision made it plain that in diversity actions in such cases the law in the State forum involved was to apply.

In *Transcontinental and Western Air, Inc. vs. Koppal*, 345 U. S. 630, the action for damages for wrongful discharge was brought in Missouri. Missouri law required as a prerequisite to Court action that the administrative remedy must first be exhausted. This Court applying the principle in the *Moore* case and *Erie R. Co. vs. Tompkins*, 304 U. S. 64, decided that since Missouri law governed the employee was bound to show he exhausted the administrative remedy before he would be permitted to maintain his court action.

In the instant case the action was brought in Pennsylvania. Pennsylvania law requires as a condition precedent to court action that the remedy provided by contract between the parties must be exhausted.

Despite this showing the Court below refused to recognize and apply it. Instead the Court below erroneously conceived the fact that petitioner utilized the administrative

procedures as an election which barred his right to maintain his damage action for breach of employment contract.

The decision of the Court of Appeals in this case conflicts with the above cited decisions of this Court and merits a review on certiorari.

2. The Court of Appeals has decided an important question concerning labor relations under the Railway Labor Law which has not been, but should be, decided by this Court.

The Court below decided that the action on a decision of a System Board of Adjustment created under a collective bargaining agreement pursuant to Section 184 of 45 U. S. C. is not subject to judicial review on the merits. This Court in *Slocum vs. Delaware L. and W. Co.*, 339 U. S. 239, in limiting the scope of the decision stated:

> "Nor are we called upon to decide any question concerning judicial proceeding to review board action or inaction."

The question of judicial review of Board action or inaction is squarely presented in this case but it has been erroneously decided in the Courts below. The decision of the Court below is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Edwards vs. Capital Airlines*, 176 F. 2d 755, which held that Board decisions are subject to judicial review.

In the Complaint, supporting affidavit and appellant's appendix printed below it was factually established that the proceedings before the administrative tribunals were irregular; that no legal safeguards were provided; that the company representatives were biased; that the System Board considered charges which were non-existent on the date of discharge; that no findings of fact were made by the Board to establish what, if any, charges were adopted to sustain

its decision that the discharge was warranted. The facts were brushed aside as inconsequential.

Chief Judge Kirkpatrick who presided in the District Court stated inter alia (appendix p. 27):

> "This Court has no jurisdiction to review the merits of the case before the Board."

He ordered that the transcript of the testimony be filed in the record, but the Court's review was merely to ascertain whether petitioner received a hearing.

Judge Kirkpatrick stated (appendix p. 26):

> "The plaintiff is, therefore, barred from prosecuting this action, unless it can be made to appear that, despite his election he never actually received the administrative consideration of the merits of his case to which he was entitled. In other words, if, for example, it should appear that the Board held no hearing or refused to allow plaintiff to appear and state his case or that it rendered its decision without receiving any evidence at all and without looking at the transcript of the record before the hearing officers, I would say that the plaintiff's election had been rendered abortive and he would be relieved of the consequences of it. If anything of this sort should appear, then, I think he would be justified in asking the Court to treat the administrative proceedings as a nullity and permit him to carry on this action."

In approving this holding the Court of Appeals stated (appendix p. 23):

> "In substance he asserts that the administrative procedure was irregular in certain of its details, that irrelevant matters were considered by the Board, that hearsay was received, and that his own conduct of which Eastern complained was not serious enough to justify his dismissal. The district court refused to consider ob-

jections of this sort. Instead, and properly, it confined itself to such inquiry as was necessary to determine whether the Board had given the plaintiff a full and fair hearing and had exercised its honest judgment in reaching its conclusions and decision on the full record."

This Court has not yet decided the question of the jurisdiction of a Court to review Board action or inaction. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals of the District of Columbia Circuit in *Edwards vs. Capital Air Lines,* 176 F. 2nd 756. There the Court decided that the action of a system board of adjustment created under contract between air line and union for determination of grievances pursuant to the Railway Labor Act is subject to judicial examination. The Court stated (p. 761):

"The contract provides that the decision of this tribunal shall be final and binding. It also happens that the few employees are non-members of the union. The question is: Can the 'final and binding' clause of the contract prevent the few employees (non-members of the union) from securing a judicial review of an adverse award made under this combination of circumstances? We must conclude, and we do, that it cannot. These appellants, in our view, had standing to bring these actions, and the court was required by their complaint to examine the validity of the award against them. Persons in their situation must have available to them, at some point, an impartial look at a decision, thus made, denying their claims to substantial rights. This is the time-honored function of an equity court. The general principle, applicable alike to judicial and to administrative determinations, is too well settled to require citation of authority. We think that the danger to the rights of the non-member few, clearly inherent in the combination of circumstances here present, calls for the application of that doctrine."

It should be noted in passing that petitioner was not represented by the union in these proceedings. Although the *Edwards* case was cited and argued below, the Court below refrained from discussing or distinguishing it. The differing opinions of the Court of Appeals for the Third Circuit and the Court of Appeals for the District of Columbia Circuit is respectfully urged as further reason for this Court to grant certiorari.

If the decision of the Court of Appeals is permitted to stand it will seriously impair the remedial objectives of the Railway Labor Act. If a System Board of Adjustment created under contract by private parties can render decisions which are immune from judicial review, under procedures which provide no legal safeguards, no employee, especially a non-union member would submit his dispute for conciliation.

Even arbitrators whose decisions are stated to be conclusive, final, and binding are subject to judicial review where partiality or arbitrary decision is shown.

Seaboard Surety Co. vs. Commonwealth, 345 Pa. 147.

3. The entry of summary judgment was a marked departure from accepted judicial practice and violated Rule 56 of the Federal Rules of Civil Procedure.

Rule 56 (c) provides inter alia:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Courts below granted summary judgment although the allegations of fact established by the Complaint, petitioner's affidavit and the matters set forth in his appendix below

showed that the dismissal charges were unproven, the company representatives who sat in judgment were the same who authorized employee's discharge; that hearsay testimony was received; that non-existent charges were presented and considered; that no findings were made to disclose which, if any, charges were adopted, and finally that the Board arbitrarily refused to decide whether petitioner's discharge was in violation of the contract terms. The facts sustaining the foregoing statements appear in the Statement of the Case and in the interest of brevity will not be repeated. The Courts below refused to take these facts into consideration in deciding the merits of the Motion for Summary Judgment as the excerpts from the Court's opinion hereinbefore quoted show.

It is self-evident that the Court below, under the guise of Rule 56, arrogated to itself the function and powers of a jury. If the facts alleged were true, petitioner could not have received a full and impartial hearing and the Court below erred in failing to accredit such facts on a motion for summary judgment.

The decision of the Court below is in conflict with the decision of this Court in *Kennedy vs. Silas Mason Co.*, 334 U. S. 249, where the Court stated that the right to enter summary judgment should be exercised cautiously and only in clear cases. Mr. Justice Jackson stated (pp. 457, 458):

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

Innumerable decisions of district courts and courts of appeal in the several circuits have steadfastly adhered to

the requirements of Rule 56 in deciding motions for summary judgment. These cases appear in Bender's Federal Practice Manual in the Annotations under Rule 56, page 454, et seq.

The decision of the Court below is in conflict with said decisions and marks a departure from settled judicial practice because there are disputed issues of fact under which defendant was not entitled to judgment as a matter of law. It was the duty of the Court below to accredit these facts and not to ignore and reject them.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL KAGLE,
OSCAR BROWN,
Attorneys for Petitioner.

APPENDIX.

OPINIONS OF THE COURTS BELOW.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,243.

J. STANLEY BOWER,
Appellant,

v.

EASTERN AIRLINES, Inc.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 2, 1954.

Before McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT OF APPEALS.

(Filed June 21, 1954.)

By HASTIE, Circuit Judge.

With jurisdiction predicated solely upon diversity of citizenship, this proceeding was instituted in a federal district court by Bower, a citizen of Pennsylvania and a discharged commercial airplane pilot against his recent employer, Eastern Air Lines, Inc., a Delaware corporation, for damages for wrongful termination of his employment. The pleadings and the record do not inform us where Bower was hired or where he was discharged. New York seems to have been his flying base, and the administration of Eastern operations seems to have involved headquarters activities in Florida, New York and New Jersey. But beyond that, we can only guess where the relevant transactions occurred. In these circumstances we cannot be sure what law creates the cause of action the plaintiff asserts. However, considerations hereinafter stated make possible a decisive disposition of this case.

The pleadings and supporting affidavits show that when notified of the termination of his employment, Bower sought and obtained review of that decision through established procedure of appeal within the Eastern organization. The highest Eastern reviewing authority sustained the dismissal. He next elected to challenge the company's action by appeal to the Eastern Air Lines Pilots' System Board of Adjustment. This Board had been established pursuant to an agreement of Eastern and its pilots as an agency to consider and settle many of their disputes. It was a continuing board with two regular members selected by the employer and two selected by the employees. The agreement provided that the Board's decisions should be "final and binding upon the parties." The Board granted Bower

a full hearing at which he was represented by counsel and testified. Thereafter the Board rendered its decision as follows:

> "The Board finds that the Company had just and reasonable cause for the discharge of Captain J. Stanley Bower; and
>
> "The Board hereby unanimously sustains the action of the Company in discharging Captain Bower from its employ."

In these circumstances the nature and legal effect of the decision of the System Board are so central to the problem of this case as to deserve somewhat more elaborate exposition. Title II of the Railway Labor Act, as added by the Act of May 10, 1936, 49 Stat. 1189, provides, in Section 204, that certain disputes between common carriers by air and their employees, if not adjusted in the usual manner, "may be referred by petition * * * by either party to an appropriate adjustment board, as hereinafter provided." 45 U. S. C. §184. This section then proceeds to make it the duty of each carrier and its employees to set up a board of adjustment with jurisdiction not exceeding that of comparable railroad adjustment boards. Under this statutory mandate and authorization Eastern and its employees have set up the System Board of Adjustment involved in this case. It was established with authority to decide such controversies as the present one and with explicit agreement of the contracting parties that "decisions of the Board in all cases properly referable to it shall be final and binding upon the parties thereto."

In his present quest for a judicial award of damages Bower is asking that a court consider *de novo* the circumstances of his discharge and whether they show legal cause for the termination of his employment. It is clear that the same issues and subject matter were before the System Board. However, appellant would have the court disregard

the decision of the board and arrive independently at a contrary opinion.

Eastern moved for summary judgment. Bower opposed the motion. Both parties filed affidavits. The entire administrative record, including the transcript of the hearing before the System Board of Adjustment was also submitted and considered on this motion. Thus advised, the district court concluded that Bower had received full and fair consideration at the hands of the System Board and was bound by its decision. Accordingly, without review of the merits of the administrative decision, the complaint was dismissed and Bower has appealed. Was the district court wrong in thus treating the decision of the System Board of Adjustment as binding upon Bower?

This is not a suit for the enforcement or review of the administrative decision. Therefore, Bower has to treat that decision as of no legal effect, or at least as vulnerable to collateral attack. One consequence of this is to make inappropriate his present reliance upon our decision in *Dahlberg v. Pittsburgh & L. E. Ry.*, 1943, 138 F. 2d 121. We there considered how far a court should go in examining the merits of a controversy when it was asked to enforce an award made in attempted settlement of that controversy by the Railroad Adjustment Board. A court may feel obligated to make at least a limited inquiry into the correctness of an administrative decision it is asked to enforce without recognizing any equivalent obligation to go behind that decision when it is involved collaterally in an independent proceeding. Indeed, *Washington Terminal Co. v. Boswell*, D. C. Cir. 1941, 124 F. 2d 235, upon which we relied in the *Dahlberg* case makes such a distinction between a proceeding to enforce a Railroad Adjustment Board order and a collateral attack upon it. We noted that distinction in the concluding paragraph of our opinion.

Pursuing a different analogy, appellant in his brief suggests that justification for what he asks here is to be found in judicial treatment of decisions of boards of arbitration

where the parties have agreed that the award in arbitration shall be final and binding. But we think it is the general rule that a court will not review the merits of a common law arbitration award which the parties have agreed to accept as final. *Firemen's Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 4 Cir. 1935, 74 F. 2d 533; *Cohen v. James Millar Co.*, 1929, 266 Mass. 55, 164 N. E. 820; *Oskaloosa Savings Bk. v. Mahaska County State Bk.*, 1928, 205 Ia. 1351, 219 N. W. 530. Closer to the present case, essentially the same position has been taken with reference to Railroad Adjustment Board decisions under Title I of the Railway Labor Act. *Michel v. Louisville and N. Ry.*, 5 Cir. 1951, 188 F. 2d 224; *Reynolds v. Denver & Rio Grande Western Ry.*, 10 Cir. 1949, 174 F. 2d 673; *Hicks v. Thompson*, Tex. Civ. App. 1948, 207 S. W. 2d 1000; *cf. Elgin, J. & E. Ry. v. Burley*, 1945, 325 U. S. 711. This line of cases is based upon the accepted view of such adjustment board decisions, stated by Justice Rutledge, speaking for the Court of Appeals of the District of Columbia in *Washington Terminal Co. v. Boswell, supra:*

> "* * * we do not believe Congress intended that * * * [adjustment board awards] should be circumvented by judicial * * * determination de novo of the merits of the controversy. * * * Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice." 124 F. 2d at 240, 244.

There has yet been but little judicial consideration of the status of the analogous adjustment boards in the aviation field as more recently established under Title II of the Railway Labor Act, but we see no more reason in this case than in those already cited for permitting a party who has submitted a dispute about his employment to an adjustment board for agreed "final and binding" disposition and has obtained such a decision, to obtain thereafter a second and independent consideration of the same issues by a court,

unimpeded by the administrative ruling. *Hartley v. Pan American Airways,* N. D. Cal. 1951, 98 F. Supp. 247; *cf. Baltimore & Ohio Ry. v. Brady,* 1933, 288 U. S. 448; *Seatrain Lines, Inc. v. Pennsylvania Ry.,* 3 Cir. 1953, 207 F. 2d 255. Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case.

We have not overlooked plaintiff's contention that under *Transcontinental & Western Air v. Koppal,* 1953, 345 U. S. 653, his submission to the System Board of Adjustment was a legal prerequisite to the maintenance of the present action at law rather than a freely chosen alternative procedure. We understand that case differently. It, like *Moore v. Illinois Central Railroad,* 1941, 312 U. S. 630, with which its holding is explicitly squared, merely recognizes the duty of a federal court in a diversity action for wrongful termination of employment to require the plaintiff to show whatever exhaustion of administrative remedy may be prerequisite to suit under the procedural law of the forum.

In the present case nothing has been pointed out to us and we have found nothing to suggest that in Pennsylvania a suit for wrongful termination of employment must be preceded by any administrative procedure beyond an unqualified dismissal that is no further reviewable within the employer's organization. Thus, Bower, did not have to obtain a System Board ruling on his contentions before invoking the jurisdiction of the district court. *Cf. Moore v. Illinois Central RR., supra.* Nevertheless he sought and obtained from that Board a decision on the merits of his case. For the reasons already stated, the district court properly treated that ruling as decisive.

This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceeding, even when these issues are raised collaterally. In this case, perhaps anticipating that we might approve a collateral challenge restricted to the jurisdiction of the Board and the essential fairness of its procedure, Bower has alleged generally that the Board's decision was arbitrary. But examination of his specific claims as shown by his supporting affidavits and his arguments shows that he is really talking about alleged mistakes of law and erroneous evaluation of evidence. In substance he asserts that the administrative procedure was irregular in certain of its details, that irrelevant matter was considered by the Board, that hearsay was received, and that his own conduct of which Eastern complained was not serious enough to justify his dismissal. The district court refused to consider objections of this sort. Instead, and properly, it confined itself to such inquiry as was necessary to determine whether the Board had given the plaintiff a full and fair hearing and had exercised its honest judgment in reaching its conclusions and decision on the full record.

Finally, we make separate mention of Bower's only contention which in any way challenges the integrity of the administrative proceeding. He complains that Chairman Shannon, a regular member of the System Board of Adjustment duly designated as such by the employer, had already participated in the company's decision against Bower. There was evidence indicating at least that in his capacity as a company executive, Shannon had been informed of the basis of the initial decision to discharge Bower and had informally approved it. Whether this circumstance might have disqualified him from sitting upon this Board of employer and employee representatives we need not decide. Cf. *Firemen's Fund Ins. Co. v. Flint Hosiery Mills*, supra. For Shannon was already known to be a member and the chairman of the Board when Bower and his counsel elected to seek reinstatement through the Board. Shannon's rela-

tionship to the case at its earlier consideration within the Eastern organization was discussed at the hearing before the System Board. No claim of surprise was made and no question was raised as to this member's qualification. Indeed, counsel who represented Bower both then and now expressed himself at the administrative hearing as confident of the ability of the members of the Board to consider and dispose of the case in an impartial way. Thus, the employee, knowing of the facts of which he now complains, was willing that the Board adjudicate his grievance. It was only after he had obtained an unfavorable decision that he undertook to disqualify a Board member. This challenge comes too late. If there was a basis of complaint originally, it has been waived. *Chicago, R. I. & P. Ry. v. Union Pac. Ry.*, 8 Cir. 1918, 254 Fed. 235; *San Carlos Opera Co. v. Conley*, S. C. N. Y. 1946, 72 F. Supp. 825.

The judgment will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

OPINIONS IN THE DISTRICT COURT.

[OPINION] SUR RE-ARGUMENT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed October 30, 1953.)

Before: KIRKPATRICK, Ch. J.

After hearing argument on this motion (which may be treated as a re-argument of the original motion) I am convinced that, in my former opinion, I drew certain conclusions from the ruling in Dahlberg v. Pittsburgh & L. E. R. Co., 138 F. 2d 121, which were not warranted. I am now satisfied that it was not the intention of the Act to give the courts jurisdiction in any proceeding, direct or collateral, to review or set aside an Adjustment Board decision which denies an employee's claim for reinstatement or back pay.

This calls for a re-examination of the plaintiff's complaint with its prayers for relief in order to see what the nature of his action is. For one thing, the plaintiff asks the court for an order directing the defendant to reinstate him as a pilot and employee, but such relief is patently beyond the power of any court to grant and that prayer may be disregarded. As I said in my earlier opinion, the action is, in essence, a suit for back pay on the theory that the plaintiff's dismissal was a nullity. The basis of the cause of action, therefore, is the plaintiff's contract of employment, under which he was to receive pay, and the gist of the action is that the defendant, despite its obligation to pay him, has refused to do so. Thus, the action, whatever its

form, is in substance a suit for damages for breach of contract.

The plaintiff did not, at the outset, bring a suit at law for breach of contract, as he might have done. Instead, he elected to take the procedure for administrative relief through arbitration proceedings, provided for by the contract and the Act of Congress. Under the law, resort to the Adjustment Board for a determination of the merits "represents an election of remedies which bars the independent suit which was otherwise available to the claimant." (Michel v. Louisville & N. R. Co., 188 F. 2d 224, 226.)

The plaintiff is, therefore, barred from prosecuting this action, unless it can be made to appear that, despite his election, he never actually received the administrative consideration of the merits of his case to which he was entitled. In other words, if, for example, it should appear that the Board held no hearing or refused to allow the plaintiff to appear and state his case, or that it rendered its decision without receiving any evidence at all and without even looking at the transcript of the record before the hearing officers, I would say that the plaintiff's election had been rendered abortive and he would be relieved of the consequences of it. If anything of this sort should appear in the present case, then, I think, he would be justified in asking the court to treat the administrative proceedings as a nullity and permit him to carry on this action.

It will thus be seen that the ultimate question is whether the plaintiff got what he elected to take in lieu of his court action for damages, namely, the consideration of his case by the Adjustment Board. The affidavits submitted upon the motion for summary judgment refer to a transcript of proceedings but no transcript was attached, and in its absence I do not see how I can determine the question. The only thing that appears is that the Board ruled, expressly, that the plaintiff's dismissal was for just and reasonable cause and, impliedly, that, regardless of technical deviations, the contract had been substantially complied with so

far as the procedure was concerned. This court has no jurisdiction to review the merits of the case before the Board. In the absence of some transcript or something to show what went on before the hearing officers and the Board, this court cannot determine the only question before it in this proceeding, namely, whether the Board did actually perform its function in hearing and determining the plaintiff's case. It may be that upon consideration of the transcript it can. If it should appear that the plaintiff was, in fact, accorded the benefit of the administrative remedy which he elected to take, the mere conclusion stated in the complaint that the action of the Board was "arbitrary" would not prevent summary judgment against him.

Under the circumstances, it would seem the sensible thing to permit either party to incorporate the transcript or other evidence to show the nature of the proceedings into the record by affidavit. I will, therefore, allow this to be done. Unless it is done within 30 days from the date of this opinion, the defendant's motion for summary judgment will be denied.

The original opinion filed in this case is withdrawn.

OPINION AFTER REARGUMENT.

Before: HON. WILLIAM H. KIRKPATRICK, Chief Justice.

Philadelphia, Pennsylvania, November 23, 1953.

APPEARANCES:

SAMUEL KAGLE, Esq., for Plaintiff.

WALTER B. GIBBONS, Esq., and W. GLEN HARLAN, Esq., for Defendant.

(After argument.)

THE COURT: The transcript of the proceedings before the System Adjustment Board has now been filed and has been considered by the Court. It is apparent that the plaintiff was in fact accorded the benefit of the administrative remedy which he elected to take and that the Board did actually perform its function in hearing and determining the plaintiff's case, and this being so, the motion for summary judgment for defendant will be granted.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS.

PRESENT:

McLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
HARRIET G. HUMPHRYS,
Deputy Clerk.

Received and Filed, June 21, 1954.
IDA O. CRESKOFF,
Clerk.

STATUTE INVOLVED.

Railway Labor Act, Title II, P. L. 487, April 10, 1936, 49 Stat. 1189, 45 U. S. C. §181, et seq.

§181. Application of Sections 151, 152, 154-163 to Carriers by Air.

"All of the provisions of Sections 151, 152, 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. * * *"

"§184. System, group, or regional boards of adjustment. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system,

group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. * * *"

6110

FILED
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HAROLD B. WILEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954—No. 334

J. STANLEY BOWER,

Petitioner,

—v.—

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Question Presented for Review 1

Statute Involved 2

Statement of the Case 5

Summary of Argument 9

ARGUMENT 11

I. Bower has elected his remedy before the Adjustment Board and is bound by the decision of that Board 11

A. Bower's action in voluntarily submitting the case to the Adjustment Board constituted an irrevocable election of the Adjustment Board remedy which precludes court action 12

B. The doctrine of election of remedies is not impaired by Transcontinental & Western Air v. Koppal, 345 U. S. 653 (1953) 19

II. Bower's action is not one for "judicial review," and in any case the Adjustment Board's decision is not subject to judicial review 25

CONCLUSION 45

TABLE OF CASES CITED:

PAGE

Berryman v. Pullman Co., 48 F. Supp. 542 (W. D. Mo. 1942) 17
Broady v. Illinois C. R.R., 191 F. (2d) 73 (C. C. A. 7th, 1951) 13
Broome v. Louisville & N. R.R., 250 S. W. (2d) 93 (Tenn., 1952) 14
Brotherhood of R. T. v. Templeton, 181 F. (2d) 527 (C. C. A. 8th, 1950) 10, 38
Burchell v. Marsh, 17 How. (U. S.) 344 (1855) 42
Buster v. Chicago, M. & St. P. R.R., 195 F. (2d) 73 (C. C. A. 7th, 1952) 14
Butler v. Thompson, 192 F. (2d) 831 (C. C. A. 8th, 1951) 13

Carner v. Union Pacific R.R., 22 Labor Cases 67,109 (D. Neb., 1952) 40
Cassaro v. Pennsylvania R.R., 130 N. Y. L. J. 911, 24 Labor Cases 67,901 (Sup. Ct., N. Y. County, 1953) .. 14
Chicago, R. I. & P. Ry. v. Union Pacific R.R., 254 Fed. 235, 238 (C. C. A. 8th, 1918) 44
Citizens Trust & Surety Co. v. Howell, 19 Pa. Superior Ct. 255 (1902) 23

Edwards v. Capital Airlines, Inc., 176 F. (2d) 755, 760 (App. D. C., 1949) 10, 38, 39, 40, 45
Elgin, J. & E. Ry. v. Burley, 325 U. S. 711 (1945) 10, 17, 33, 34, 35, 38
Erie R.R. v. Tompkins, 304 U. S. 64 (1938) 24, 25, 45

Futhey v. Atchison, T. & S. F. Ry., 96 F. Supp. 864 (N. D. Ill., 1951) 26, 35, 36

General Committee v. Missouri-Kansas-Texas R.R., 320 U. S. 323 (1943) 18, 22, 28

PAGE

General Committee v. Southern Pacific Co., 320 U. S. 338 (1943) 18, 22, 28
Glen Alden Coal Co. v. Unemployment Compensation Board, 168 Pa. Superior Ct. 534, 79 A. (2d) 796 (1951) 23, 24

Hargis v. Wabash R.R., 163 F. (2d) 608 (C. C. A. 7th, 1947) 17
Hartley v. Pan American Airways, Inc., 98 F. Supp. 247 (N. D. Cal., 1951) 17, 18, 19, 37
Hecox v. Pullman Co., 85 F. Supp. 34 (W. D. Wash., 1949) 17
W. E. Hedger v. James Richardson & Sons, 26 F. Supp. 11 (E. D. N. Y., 1938) 44

Illinois C. R.R. v. Brotherhood of Railway Trainmen, 83 F. Supp. 930 (N. D. Ill., 1949) 13

Keel v. Illinois Terminal R.R., 346 Ill. App. 169, 104 N. E. (2d) 659 (1952) 20
Kelly v. Nashville, C. & St. L. Ry., 75 F. Supp. 737 (E. D. Tenn., 1948) 17, 42
Kelly v. Nashville, C. & St. L. Ry., 15 Labor Cases 64,746 (E. D. Tenn., 1948) 20
Kendall v. Pennsylvania R.R., 94 F. Supp. 875 (N. D. Ohio, 1950) 13
Kirby v. Pennsylvania R.R., 188 F. (2d) 793 (C. C. A. 3d, 1951) 10, 26

Lodge No. 19 v. Svi Sveti, 323 Pa. 292, 185 Atl. 650 (1936) 23

Mayfield v. Thompson, 24 Labor Cases 67,859 (Kansas City Ct. of App., Oct. 5, 1953) 20
Michel v. Louisville & N. R.R., 188 F. (2d) 224 (C. C. A. 5th, 1951) 9, 10, 12, 14, 31, 32, 35

PAGE

Moore v. Illinois Central Railroad, 312 U. S. 630 (1941) 12, 24, 25, 45
Morelle v. New York Central R.R., 19 Labor Cases 66,215 (N. D. Ohio, 1951) 14

Newman v. Baltimore & O. R.R., 191 F. (2d) 560 (C. C. A. 3d, 1951) 13
New Orleans Public Belt R.R. Commission v. Ward, 182 F. (2d) 654 (C. C. A. 5th, 1950) 32

Order of Railway Conductors v. Pitney, 326 U. S. 561 (1946) 18, 22
Order of Railway Conductors v. Southern Ry., 339 U. S. 255 (1950) 18, 22

Philadelphia Housing Authority v. Turner Construction Co., 343 Pa. 512, 23 A. (2d) 426 (1942) 11, 41, 44
Pigott v. Detroit, T. & I. R.R., 116 F. Supp. 949 (E. D. Mich., 1953) 14

Railroad Yardmasters of North America v. Pittsburgh & L. E. R.R., 39 F. Supp. 876 (N. D. Ohio, 1940) 10, 26, 27
Ramsey v. Chesapeake & O. R.R., 75 F. Supp. 740 (N. D. Ohio, 1948) 17
Reynolds v. Denver & R. G. W. R.R., 174 F. (2d) 673 (C. C. A. 10th, 1949) 17
Richardson v. Ozark Airlines, Inc., 26 Labor Cases 68,571 (Mo. 1954) 14
Ringle v. Transcontinental & Western Air, 113 F. Supp. 897 (W. D. Mo., July 27, 1953) 20

San Carlo Opera Co. v. Conley, 72 F. Supp. 825 (S. D. N. Y., 1946) 44
Seaboard Surety Company v. Commonwealth, 345 Pa. 147 44

PAGE

Slocum v. Delaware L. & W. R.R., 339 U. S. 239 (1950) 12, 18, 22, 37, 38
Switchmen's Union v. National Mediation Board, 320 U. S. 297 (1943) 18, 22, 27, 30, 35
Switchmen's Union v. Ogden Union Ry. and Depot Co., 209 F. (2d) 419 (C. C. A. 10th, 1954) 14

The Hartbridge Case, 62 F. (2d) 72 (C. C. A. 2d, 1932), cert. denied, 288 U. S. 601 (1933) 42
Transcontinental & Western Air v. Koppal, 345 U. S. 653 (1953) 9, 19, 20, 21, 22, 24, 25, 45

United Fuel Gas Co. v. Columbian Fuel Corp., 165 F. (2d) 746 (C. C. A. 4th, 1948) 42

Van Zandt v. Railway Express Agency, 99 F. Supp. 520 (S. D. N. Y., 1950) 13

Walling v. Fairmont Creamery Co., 139 F. (2d) 318 (C. C. A. 8th, 1943) 36
Warmack v. Loftin, 19 Labor Cases 66,159 (S. D. Fla., 1951) 17
Washington v. Maricopa County, 143 F. (2d) 871 (C. C. A. 9th, 1944) 36
Washington Terminal Co. v. Boswell, 124 F. (2d) 235 (App. D. C., 1941) 17, 27, 32, 35
Williams v. Atchison, T. & S. F. Ry., 204 S. W. (2d) 693 (Mo. Sup. Ct., 1947) 17
Wilson v. St. Louis-S. F. Ry., 247 S. W. (2d) 644 (Mo. 1952) 20, 21

ACTS CITED:

Administrative Procedure Act, 60 Stat. 237, 918, 993; 61 Stat. 37, 201; 62 Stat. 99; 5 U. S. C. 1001 ..... 10, 30

Railway Labor Act, 44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189; 45 U. S. C. 151 ..... 2, 5, 9, 10, 18, 19, 27, 28

OTHER AUTHORITIES:

PAGE

Corpus Juris Secundum, Arbitration and Award. Volume 6, Section 104 (d) 43

Garrison, National Railroad Adjustment Board, A Unique Administrative Agency, 46 Yale L. J. 567 (1937) 33

Senate Document 248, 79th Congress, 2nd Session (1946) 30, 31

IN THE

Supreme Court of the United States

October Term, 1954—No. 334

J. STANLEY BOWER,

Petitioner,

—v.—

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Eastern Air Lines, Inc., opposes the petition for writ of certiorari filed by Petitioner, J. Stanley Bower, in the above-entitled case and shows the Court as follows:

Opinions Below

The opinion of the District Court of the United States for the Eastern District of Pennsylvania is reported by Commerce Clearing House in 24 Labor Cases 67,952, and the decision of the Court of Appeals affirming the decision of the District Court is reported in 214 F. (2d) 623.

Question Presented for Review

Although the petitioner states in various forms the questions which he deems to be presented for review, the basic question is the following:

Can a discharged employee—who has voluntarily elected to have his claim for reinstatement and back pay decided by an Adjustment Board created under the Railway Labor Act pursuant to an agreement and a statutory provision that the Adjustment Board decision shall be "final and binding"—maintain an independent court action for reinstatement and back pay after receiving an *adverse* decision from the Adjustment Board?

Statute Involved

The petition for certiorari (pages 29-30) sets forth the portions of Title II of the Railway Labor Act (45 U. S. C. Sections 181 *et seq.*) which are deemed applicable to this case. However, in view of the fact that Section 204 of Title II of that Act (45 U. S. C. Section 184) refers to Section 3 of Title I (45 U. S. C. Section 153) to establish the authority and jurisdiction of a system board of adjustment such as the one which denied Bower's claim, it is necessary to set out also the applicable language of Section 3.

The reference to Section 3 is contained in the following language of Section 204:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, title I, of this act."

The jurisdiction of a regional board of adjustment under Title I is stated as follows in Section 3 (w):

> "(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for

such limited periods as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. . . ."

Since a regional board of adjustment has the same jurisdiction as the division of the National Railroad Adjustment Board which appointed it (and since Section 204 extends the same jurisdiction to the System Board of Adjustment involved in this case) the following provisions of Section 3 of the Act become pertinent:

"(m) The awards of the several divisions of the Adjustment Board shall be ~~stated~~ in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to

pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceeding, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within 2 years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Statement of the Case

This is an action by J. Stanley Bower (hereinafter referred to as Bower), a discharged employee of Eastern Air Lines, Inc. (hereinafter referred to as Eastern), seeking reinstatement in his former position as pilot of Eastern's aircraft and further seeking to recover the compensation which he would have received as pilot if he had not been discharged.

Eastern filed a motion for summary judgment seeking judgment for the defendant on the ground that Bower submitted his entire claim (for reinstatement and lost wages) to the "Eastern Air Lines Pilots System Board of Adjustment" (hereinafter referred to as the Adjustment Board) pursuant to an agreement that the decision of the Adjustment Board would be "final and binding upon the parties"; that Bower thereby elected his remedy and waived the alternative remedy of court action; and that since the decision of the Adjustment Board was adverse to Bower and supported Eastern's action in discharging him, he has no standing in court to maintain this action. The applicable statute is the Railway Labor Act, 44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189; 45 U. S. C. 151.

The undisputed basic facts are as follows:

Bower was employed by Eastern as a pilot from October 15, 1941 until May 19, 1950. Effective as of the latter date, he was discharged.

Bower urged the management of Eastern to reinstate him as a pilot, but his request was rejected. In accordance with Section 29 of the then effective agreement between Eastern and the pilots in its employ as represented by the Air Line Pilots Association (hereinafter referred to as the Agreement), Bower demanded and received a hearing before "a junior operating official of the Company designated by the Company for that purpose" (See Eastern's Appendix,* pp. 9a-9b, 16a). The hearing was held commenc-

* References to Appendices herein are to those printed for use in the Court of Appeals.

ing January 12, 1951, and a reconvened hearing was held on September 11, 1951, "at both of which hearings Bower was personally present and was represented by the same counsel who represents him in the above-entitled action"; and Bower presented at the hearing, personally and through counsel, "all of the facts, arguments and contentions which are contained in the complaint in the above-entitled action" (Eastern's Appendix, p. 10a).

The decision of the junior operating officer of the Company sustained the action of the Company in discharging Bower (Bower's Appendix, p. 11a).

Bower filed an appeal to the Vice President in Charge of Operations of Eastern pursuant to Section 29 (b) of the Agreement, and a further hearing was held October 24, 1951, before a senior operating official of the Company designated by the Company for that purpose pursuant to said section of the Agreement, at which hearing Bower and the same counsel again presented all of the arguments, facts and contentions which are contained in the complaint in this action (Eastern's Appendix, pp. 10a-11a, 16a).

After consideration of the record, the senior operating official issued his decision on November 1, 1951, upholding the action of Eastern in discharging Bower (Bower's Appendix, pp. 11a-12a.

Bower appealed to the Adjustment Board in accordance with Section 29 (c) of the Agreement, and a further hearing was held before the Adjustment Board on May 20, 1952 at which Bower and his counsel again presented all of the arguments, facts and contentions which are contained in the complaint in this action (Eastern's Appendix, pp. 11a-12a, 16a-17a).

The Adjustment Board was created pursuant to an agreement dated July 23, 1941, between Eastern and the pilots in its employ as represented by the Air Line Pilots Association, and pursuant to that agreement the Board consisted of two members selected by the pilots and two selected by the Company (Eastern's Appendix, pp. 5a-7a). The agreement of July 23, 1941 provided in paragraph (1)

that "decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto" (Eastern's Appendix, p. 6a).

After consideration of the entire record of the case, the Adjustment Board issued on July 11, 1952 its unanimous decision upholding the action of the Company in discharging Bower (Bower's Appendix, p. 13a).

Thereafter, Bower filed his complaint in this action.

Eastern filed a Motion for Summary Judgment (Bower's Appendix, p. 9a) and affidavits in support thereof (Bower's Appendix, pp. 10a-13a; Eastern's Appendix, pp. 8a-17a). After argument on the motion, Chief Judge Kirkpatrick filed an opinion on October 30, 1953 (Bower's Appendix, pp. 34a-37a), stating in part as follows:

> "Under the law, resort to the Adjustment Board for a determination of the merits 'represents an election of remedies which bars the independent suit which was otherwise available to the claimant.' (Michel v. Louisville & N. R. Co., 188 F. 2d 224, 226).
>
> "The plaintiff is, therefore, barred from prosecuting this action, unless it can be made to appear that, despite his election, he never actually received the administrative consideration of the merits of his case to which he was entitled. In other words, if, for example, it should appear that the Board held no hearing or refused to allow the plaintiff to appear and state his case, or that it rendered its decision without receiving any evidence at all and without even looking at the transcript of the record before the hearing officers, I would say that the plaintiff's election had been rendered abortive and he would be relieved of the consequences of it. If anything of this sort should appear in the present case, then, I think, he would be justified in asking the court to treat the administrative proceedings as a nullity and permit him to carry on this action."

Chief Judge Kirkpatrick further said:

> "If it should appear that the plaintiff was, in fact, accorded the benefit of the administrative remedy which

> he elected to take, the mere conclusion stated in the complaint that the action of the Board was 'arbitrary' would not prevent summary judgment against him.
>
> "Under the circumstances, it would seem the sensible thing to permit either party to incorporate the transcript or other evidence to show the nature of the proceedings into the record by affidavit. I will, therefore, allow this to be done."

Pursuant to the above-quoted authorization, Eastern filed with the trial court the complete transcript of testimony in the administrative hearings on Bower's case, including 193 pages of testimony and exhibits presented at a hearing before Captain J. H. Halliburton on January 12, 1951, 144 additional pages of testimony taken at a hearing before Captain Halliburton on September 11, 1951, and a volume setting forth the hearing on May 20, 1952, before the Eastern Air Lines System Board of Adjustment. Accompanying such materials, Eastern submitted an affidavit (Eastern's Appendix, pp. 15a-17a) by S. L. Shannon, Chairman of the Adjustment Board, showing that the evidence so presented was fully considered by the Adjustment Board, and that Bower was given a full and complete opportunity to present any and all evidence and arguments which he might desire to offer.

After further argument, and after the trial court had considered the materials so presented, the court granted Eastern's motion for summary judgment (Eastern's Appendix, p. 18a, Bower's Appendix, p. 37a).

The Court of Appeals upheld the trial court for the reasons stated in its opinion set forth in Bower's petition for certiorari (pp. 18-24).

Summary of Argument

1. Bower voluntarily submitted his case to the Adjustment Board for decision under a contractual provision and a statutory requirement (Railway Labor Act Sections 3 (m) and 204) that the decision should be "final and binding." He has thus elected his remedy, is bound by the adverse decision which he received from the Adjustment Board, and may not bring a court action to try the same issues. *Michel* v. *Louisville & N. R.R.*, 188 F. (2d) 224 (C. C. A. 5th, 1951) and other cases cited hereinafter. There is no conflict between this principle of "election of remedies" and the doctrine of *Transcontinental & Western Air* v. *Koppal*, 345 U. S. 653 (1953). The *Koppal* case holds simply that, where state law requires exhaustion of administrative remedies prior to court action for breach of an employment contract, a federal court has no jurisdiction of such an action until the administrative remedies have been exhausted. The Court of Appeals correctly held in this case (Bower's petition, p. 22) that the "administrative remedies" which must be exhausted prior to court action are only those steps which are necessary to obtain "an unqualified dismissal that is no further reviewable *within the employer's organization.*" (Italics supplied.) In the *Koppal* case the discharged employee had not exhausted the intra-company procedure and therefore had not received "an unqualified dismissal." There is nothing in the *Koppal* decision to indicate that the Adjustment Board procedure was a part of the "administrative remedy" which must be exhausted as a preliminary to court action, and the language and purpose of the Railway Labor Act together with the unanimous decisions of courts which have construed it establish that the Adjustment Board remedy is not a "preliminary" to court action, but is intended to have "final and binding" effect in deciding labor disputes. The Pennsylvania court decisions cited by Bower, if applicable to this case, do not purport to require more than the exhaustion of the intra-company procedure referred to by the Court of Appeals.

2. Bower's action is not one for "judicial review" but in fact is an *independent* action which seeks to *ignore* the Adjustment Board decision denying reinstatement and back pay. Such a collateral attack on the Adjustment Board decision is improper in any event. *Kirby* v. *Pennsylvania R.R.*, 188 F. (2d) 793 (C. C. A. 3d, 1951; *Railroad Yardmasters of North America* v. *Pittsburgh & L. E. R.R.*, 39 F. Supp. 876 (N. D. Ohio, 1940). A direct attack on such an Adjustment Board decision likewise cannot be maintained since no judicial review is available with respect to Adjustment Board decisions *adverse* to the employee who elected the Adjustment Board remedy. See the *Michel* case, *supra*, and other cases discussed hereinafter. The language and purpose of the Railway Labor Act (Section 3) make it clear that Adjustment Board awards *in favor of the employee* are the only ones which are subject to judicial action, and Section 2 (a) of the Administrative Procedure Act (5 U. S. C. 1001) expressly excluded Adjustment Boards from the procedural and appeal provisions of that Act. While the courts may properly investigate Adjustment Board decisions adverse to the appellant to the extent necessary to make certain that the Adjustment Board had jurisdiction of the dispute (*Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711 (1945); *Brotherhood of R. T.* v. *Templeton*, 181 F. (2d) 527 (C. C. A. 8th, 1950); *Edwards* v. *Capital Airlines*, 176 F. (2d) 755 (App. D. C., 1949)), the courts do not have jurisdiction to review such decisions of Adjustment Boards on the merits. There is no contention in this case that the Adjustment Board lacked jurisdiction, or that there was a conflict of economic interests between Bower and the union representatives on the Adjustment Board as in *Edwards* v. *Capital Airlines;* and the trial court upon examination of the entire transcript of the proceedings before the Adjustment Board concluded that Bower had received full and fair consideration by that Board. Therefore, no judicial action is warranted to relieve Bower from the decision which he agreed would be "final and binding." The decision would be similarly immune from

judicial review if it had been an arbitration award. *Philadelphia Housing Authority* v. *Turner Construction Co.*, 343 Pa. 512, 23 A. (2d) 426 (1942), and other cases cited hereinafter. Since all of the federal and state courts which have ruled on the question have held that judicial review is not available in cases such as this, there is no need for a ruling by this Court.

ARGUMENT

I.

Bower has elected his remedy before the Adjustment Board and is bound by the decision of that Board.

Bower's own amended complaint represents in paragraph 8 (Bower's Appendix, p. 4a) that "Plaintiff exhausted all remedies provided in said Agreements," referring to the agreements between Eastern and its pilots as represented by the Air Line Pilots Association. As shown by Eastern's affidavits (Eastern's Appendix, pp. 8a-17a), the entire procedure prescribed in the agreements between Eastern and the pilots was followed, and Bower carried his complaint through all steps of the grievance procedure and all the way through to final decision by the Adjustment Board. It is Eastern's position that such course of action by Bower (which was taken by him without suggestion or request of any person connected with the management of Eastern —see Eastern's Appendix, pp. 9a, 10a, 11a) constituted an election of remedies and a waiver of Bower's right to maintain a court action against Eastern for alleged wrongful discharge. Since he has elected one course of action and has lost before the Adjustment Board, he is bound by his election and by the decision of the Adjustment Board, and cannot now adopt the other alternative which originally was available to him—namely, to sue the Company in Court.

A. *Bower's action in voluntarily submitting the case to the Adjustment Board constituted an irrevocable election of the Adjustment Board remedy which precludes court action.*

Plaintiff had two entirely inconsistent alternative courses of action which he could have followed upon being discharged: (1) he could have regarded the discharge as final and proceeded to court action for damages based on alleged "wrongful discharge" (*Moore* v. *Illinois Central Railroad*, 312 U. S. 630 (1941); *Michel* v. *Louisville & N. R.R.*, 188 F. (2d) 224 (C. C. A. 5th, 1951), and other cases cited herein); or (2) he could claim a continuing employment relationship, demanding hearing before the Adjustment Board and seeking reinstatement with back wages.

These alternatives are mutually exclusive, not only because the first assumes that the employment relationship is at an end while the second assumes that it is continuing, but also because they *must* be pursued before different tribunals. It is obvious that the Company officers and the Adjustment Board could not and would not award damages if the plaintiff accepted his discharge as final, for their jurisdiction is over employees, not strangers. And the courts have universally held that they have no jurisdiction over the second alternative—reinstatement—since the Adjustment Board is created pursuant to act of Congress (the Railway Labor Act) for precisely the purpose of settling such matters and the courts will not interfere with the interpretation and administration of a collective bargaining contract where a continuing employment relationship is contemplated.

The essential distinction between the two alternatives is indicated by the following language from the Supreme Court's decision in *Slocum* v. *Delaware L. & W. R.R.*, 339 U. S. 239, 244-245 (1950):

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railway. He could have challenged the validity

of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the Moore case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion."

The following are some of the additional authorities which hold specifically that actions for reinstatement (and, in some cases, even actions for back wages when combined with an action for reinstatement), and similar actions contemplating a continuing employment relationship, will not under any circumstances be entertained by the courts:

Newman v. *Baltimore & O. R.R.*, 191 F. (2d) 560 (C. C. A. 3d, 1951);

Broady v. *Illinois C. R.R.*, 191 F. (2d) 73 (C. C. A. 7th, 1951);

Butler v. *Thompson*, 192 F. (2d) 831 (C. C. A. 8th, 1951);

Van Zandt v. *Railway Express Agency*, 99 F. Supp. 520 (S. D. N. Y., 1950);

Kendall v. *Pennsylvania R.R.*, 94 F. Supp. 875 (N. D. Ohio, 1950);

Illinois C. R.R. v. *Brotherhood of Railway Trainmen*, 83 F. Supp. 930 (N. D. Ill., 1949);

Morelle v. *New York Central R.R.*, 19 Labor Cases 66,215 (N. D. Ohio, 1951);
Buster v. *Chicago, M. & St. P. R.R.*, 195 F. (2d) 73 (C. C. A. 7th, 1952);
Broome v. *Louisville & N. R.R.*, 250 S.W. (2d) 93 (Tenn., 1952);
Switchmen's Union v. *Ogden Union Ry. and Depot Co.*, 209 F. (2d) 419 (C. C. A. 10th, 1954);
Richardson v. *Ozark Airlines, Inc.*, 26 Labor Cases 68,571 (Mo., 1954);
Pigott v. *Detroit, T. & I. R.R.*, 116 F. Supp. 949 (E. D. Mich., 1953); and
Cassaro v. *Pennsylvania R.R.*, 130 N. Y. L. J. 911, 24 Labor Cases 67,901 (Sup. Ct. N. Y. County, 1953).

Since the reinstatement route (appeal to the Adjustment Board) and the damages route (action in court for damages) are inconsistent and require resort to different tribunals, the courts have uniformly held that election of one route precludes subsequent resort to the other where the decision is unfavorable to the employee.

A full discussion of the principles involved and of various authorities holding that submission of a claim to the Adjustment Board constitutes a binding election of remedies is presented in *Michel* v. *Louisville & N. R.R., supra.* The *Michel* case involved the claim of a former employee that he had been wrongfully discharged and his suit for reinstatement with back wages from the time of discharge to the time of reinstatement. The employee claimed (as in this case) that the carrier had not complied with the contractual requirements as to notice and other procedures prior to discharge. Before bringing suit, the employee had processed his claim through the entire contractual grievance procedure and had pressed it to decision by the National Railroad Adjustment Board, which had upheld the action of the carrier in discharging him. Thus, the case is entirely parallel to the instant case, and the following language of the Circuit Court of Appeals is deemed to be applicable to this case (188 F. (2d) 226-227):

"There is, however, no requirement that an employee so prosecute his claim for relief for breach of an employment agreement before the Adjustment Board. He may proceed in the first instance by suit in the Courts to recover damages for breach of the contract. Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, and as further discussed in Slocum v. Delaware, L. & W. R. Co., supra. However, when there is a voluntary election to proceed in the manner provided by the Railway Labor Act, 45 U. S. C. A. §151 et seq., supra, and the claim pursued to a determination of the merits by the Adjustment Board, this procedure by both right and reason represents an election of remedies which bars the independent suit which was otherwise available to the claimant. This construction finds strong support in the statute, especially the provision that 'the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award * * *.' In any event, it can not be questioned that by the Act Congress has established a forum for the settlement of such disputes to which the employee may resort if he so desires. Consequently, there would appear no reason for not enforcing in such instances the fundamental principle that where one of two inconsistent remedies are available, the election of one precludes recourse to the other. This has been the uniform holdings, correctly we think, of the Courts which have considered this question. It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim.

"It is asserted, however, that if the provisions of the statute and the award of the Adjustment Board be given the effect just indicated, then the statute is

unconstitutional as evidencing a delegation of judicial power to the Adjustment Board. As we have seen, the statute provides the manner or system of procedure, as well as the finality of the result. This case presents the reverse of the question determined in Washington Terminal Company v. Boswell, supra, and New Orleans Public Belt Railroad Comm. v. Ward, 5 Cir., 182 F. 2d 654, in that here the 'finality' is operative against the employee, but this, as shown, results from a voluntary submission of the question to the Adjustment Board. It would seem clear that the award of a body, having a function of such importance as that recourse to it is requisite even before the institution of litigation in bankruptcy (Pitney case, supra), or State (Slocum case supra) Courts, is entitled to receive the finality provided by the statute against one who voluntarily invokes its jurisdiction.

"As we view the matter, there is no occasion for any examination of the constitutional question sought to be presented, for the appellant having presented and prosecuted his claim, in the manner provided by the statute, which eventuated in an adverse award, must be held by such conduct and election to have waived the right to assail the constitutional validity of the manner and extent of redress afforded by the terms of the statute under which he proceeded. Wall v. Parrot Silver & Cooper Co., 244 U. S. 407, 411, 37 S. Ct. 609, 61 L. Ed. 1229, and citations; Booth Fisheries v. Industrial Comm., 271 U. S. 208, 46 S. Ct. 491, 70 L. Ed. 908, and citations; Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, 68 A. L. R. 350, and opinion affirming at 281 U. S. 457, 50 S. Ct. 382, 74 L. Ed. 962. We therefore do not consider the attack upon the constitutionality of the statute."

Other cases which hold that submission of a claim to an Adjustment Board under the Railway Labor Act is an election of remedies and that the adverse decision of the Adjustment Board is binding and precludes court action are as follows:

Berryman v. *Pullman Co.*, 48 F. Supp. 542 (W. D. Mo. 1942)—an action for reinstatement with back wages.

Hargis v. *Wabash R.R.*, 163 F. (2d) 608 (C. C. A. 7th, 1947)—an action to determine employee rights under a collective bargaining agreement.

Ramsey v. *Chesapeake & O. R.R.*, 75 F. Supp. 740 (N. D. Ohio, 1948)—an action for reinstatement and back wages.

Kelly v. *Nashville, C. & St. L. Ry.*, 75 F. Supp. 737 (E. D. Tenn., 1948)—an action for reinstatement and back wages.

Reynolds v. *Denver & R. G. W. R.R.*, 174 F. (2d) 673 (C. C. A. 10th, 1949)—an action for reinstatement and back wages.

Hecox v. *Pullman Co.*, 85 F. Supp. 34 (W. D. Wash., 1949)—an action for reinstatement and back wages.

Warmack v. *Loftin*, 19 Labor Cases 66,159 (S. D. Fla., 1951)—an action for reinstatement and back wages.

Hartley v. *Pan American Airways, Inc.*, 98 F. Supp. 247 (N. D. Cal., 1951)—an action for reinstatement and back wages.

Williams v. *Atchison, T. & S. F. Ry.*, 204 S. W. (2d) 693 (Mo. Sup. Ct. 1947)—an action to determine seniority rights of employees.

The question as to finality of a decision of an adjustment board has not been definitely decided by the Supreme Court. However, it should be noted that in *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711 (1945), the majority of the Court specifically reserved the question of finality as being unnecessary for decision in the case (325 U. S. 720 and 749), and the four dissenting justices stated positively their belief that the denial of a money award by an adjustment board is final and is not subject to judicial review (325 U. S. 760-761). It should be further noted that the majority opinion in that case was written by Mr. Justice Rutledge who, as a member of the Court of Appeals for the District of Columbia, said in *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235, 244 (App. D. C., 1941), affirmed

by equally divided court, 319 U. S. 732 (1943), that "The *Moore* decision holds that Congress has not compelled disputants to go before the Board. It does not hold that, having gone, they can disregard the award and its consequences at will." The virtually unanimous decisions of other courts that submission of a claim to an adjustment board is an election of remedies which bars court action is wholly consistent with the decisions of this Court holding that the courts should refrain from acting on labor relations disputes—and particularly matters such as Bower's, which require interpretation of collective bargaining agreements —as to which the Railway Labor Act provides an adequate procedure for settlement. See for example: *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338 (1943); *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U. S. 323 (1943); *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943); *Slocum* v. *Delaware, L. & W. R.R., supra; Order of Railway Conductors* v. *Southern Ry.*, 339 U. S. 255 (1950); *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946).

All of the above cases except *Hartley* v. *Pan American Airways, Inc.* involved Title I of the Railway Labor Act, and the adjustment board referred to in them is the National Railroad Adjustment Board which has jurisdiction of railroad cases. The *Hartley* case arose under Title II of the Railway Labor Act, and therefore is direct authority for the proposition that a decision of an adjustment board created by agreement between an air carrier and its employees is equally final and binding. While the court in the *Hartley* case refers to the "Railroad Adjustment Board," it is of course apparent from the Act itself that Pan American Airways and its employees are not subject to the National Railroad Adjustment Board, and therefore the adjustment board decision there held to be final and binding was a decision of a Pan American Airways System Board of Adjustment which was created under Section 204 of the Act, just as was the Eastern Pilots Board.

The Adjustment Board which decided Bower's case was created pursuant to the express statutory duty of Eastern and its pilots to establish such a tribunal, and since it was given the same jurisdiction as adjustment boards under Title I of the Act (See Sections 3 and 204 of the Act, quoted above), and since the agreement creating it provided that its decisions would be final and binding, there is no reason why its decisions should not be as final and as unassailable in court as are the decisions of the National Railroad Adjustment Board. Such quite clearly was the conclusion of the court in the *Hartley* case, as well as the courts below.

B. *The doctrine of election of remedies is not impaired by* Transcontinental & Western Air v. Koppal, *345 U. S. 653 (1953).*

Bower now appears to argue (petition, pp. 7-11) that the decision in *Transcontinental & Western Air* v. *Koppal,* 345 U. S. 653 (1953), impliedly holds that an employee may "exhaust his administrative remedies" by going through all steps of the grievance procedure *and carrying his case to "final and binding" decision by the Adjustment Board,* and thereafter maintain a court action.

Of course, the *Koppal* case neither states nor implies such a revolutionary holding, which would be completely at variance with the unanimous authorities on "election of remedies" cited above. The situation presented in the *Koppal* case was simply that of a discharged employee who had a hearing in the *second step* of the grievance procedure specified in the contract, but who did not appeal from the decision in "Step 2" to "Step 3"—the "chief operating officer of the Company"—as provided for in the collective bargaining agreement. The "administrative remedies" which Koppal failed to exhaust were those which permitted him to appeal from one level of management to another—all within the Company. If he had exhausted such remedies, then he would have been faced with the election between the Adjustment Board remedy and the court remedy as discussed above.

There is no intimation in the *Koppal* case that Koppal could have proceeded to final decision by the Adjustment Board and thereafter maintain a court action. All of the decisions cited above are to the contrary, and it is inconceivable that the Supreme Court would have overruled such decisions without even referring to the problem or to the unanimous line of authorities holding that submission of a case to the Adjustment Board is a binding election.

The foregoing interpretation of the *Koppal* case is consistent with the uniform holding of the courts that the discharged employee may carry his case through all of the steps of the intra-company grievance procedure and thereafter maintain a court action for damages so long as he stops short of the Adjustment Board:

Kelly v. *Nashville, C. & St. L. Ry.*, 15 Labor Cases 64,746 (E. D. Tenn., 1948);
Wilson v. *St. Louis-S. F. Ry.*, 247 S. W. (2d) 644 (Mo., 1952);
Keel v. *Illinois Terminal R. R.*, 346 Ill. App. 169, 104 N. E. (2d) 659 (1952).

The *Koppal* case may be better understood by noting that the decisions of Missouri courts relied upon by the Supreme Court (345 U. S. 657-658) to show that administrative remedies must be exhausted under Missouri law, involved employees who failed to exhaust the intra-company grievance procedure, and did not relate to employees who had elected to go to court rather than to the Adjustment Board after exhausting such procedure.

The same is true of two Missouri cases decided since the *Koppal* case:

Mayfield v. *Thompson*, 24 Labor Cases 67,859 (Kansas City Ct. of App., Oct. 5, 1953);
Ringle v. *Transcontinental & Western Air*, 113 F. Supp. 897 (W. D. Mo., July 27, 1953).

Significantly, a decision of the Missouri Supreme Court (*Wilson* v. *St. Louis-S. F. Ry., supra*) holds that an employee could maintain a court action where he had exhausted his intra-company grievance remedies, but had not exercised an election to take the case to the Adjustment Board. Certainly, if the Missouri court had thought that "exhaustion of administrative remedies" included pursuing the matter to final decision by the Adjustment Board, it would have dismissed the *Wilson* case for failure to exhaust administrative remedies instead of holding, as it did, that Wilson could maintain his court action *because* he had not taken the case to the Adjustment Board.

From the foregoing, it is clear that the *Koppal* case does not change the doctrine of election of remedies. It simply makes clear that the election must be exercised *after* exhaustion of intra-company grievance procedures and *before* appeal to the Adjustment Board.

The proper analysis of the "administrative remedy" in this case is that made by the Court of Appeals (Bower's petition, p. 22), namely that Bower could not bring a court action until he had obtained "an unqualified dismissal that is no further reviewable *within the employer's organization.*" (Italics supplied.) It appears reasonable to require an employee to obtain a final decision from his *employer* before he seeks judicial or other relief.

But once the employee has received a final dismissal by the employer, he has alternative remedies: (1) appeal to the Adjustment Board, (2) court action, and (3) arbitration with the consent of the employer.

Certainly if Bower had elected either of the last two remedies and had lost, it would not be contended that he could thereafter elect the first. Since he has elected the first, under an agreement and a statutory provision that the decision of the Adjustment Board shall be "final and binding," he is foreclosed from either of the other two remedies.

It is incongruous to refer to a decision by either an arbitrator or an adjustment board as merely an "administrative remedy" preliminary to court action when a decision

by either tribunal is the result of an adversary proceeding designed to settle the entire controversy.

Bower's petition cites (pp. 8-9) three Pennsylvania court decisions which allegedly support the proposition that Pennsylvania law requires the exhaustion of administrative remedies before court action is brought. Two preliminary comments concerning those cases are in order:

(1) The *Koppal* decision indicates (345 U. S. 656-657) that the law of the place of making and performance of the contract would govern as to the necessity of "exhausting administrative remedies." As the Court of Appeals notes (Bower's petition, p. 18), Bower's flying and Eastern's headquarters related to Florida, New York and New Jersey. There is no basis for any claim that the law of Pennsylvania governs the contract.

(2) Even if the applicable substantive or procedural law were deemed to *require* resort to the Adjustment Board in all cases, that certainly does not lead inexorably to the conclusion that Bower must be allowed to maintain a court action after obtaining a "final and binding" decision from the Adjustment Board. As this Court has held many times, the administrative remedy may be the *only* remedy, even in matters involving substantial rights, and particularly in matters under the Railway Labor Act involving the delicate subject of employer-employee relations as to which Congress has provided for an agency—the Adjustment Board—"peculiarly competent in this field." *Slocum* v. *Delaware, L. & W. R.R., supra; General Committee* v. *Southern Pacific Co., supra; General Committee* v. *Missouri-Kansas-Texas R.R., supra; Switchmen's Union* v. *National Mediation Board, supra; Order of Railway Conductors* v. *Southern Ry., supra; Order of Railway Conductors* v. *Pitney, supra.*

Aside from the foregoing comments, it should be emphasized that Bower has cited no authority to support his apparent assumption that the Adjustment Board is part

of the "administrative remedy" which Bower might or must exhaust before proceeding to court, and the Pennsylvania cases which he has cited do not even show that *any* administrative remedy must be exhausted in a situation such as this. None of the cases cited by Bower deals with the question of the right to sue in court—either before or after exhausting administrative remedies—for breach of a collective bargaining or other employment agreement:

Citizens Trust and Surety Co. v. *Howell,* 19 Pa. Superior Ct. 255 (1902) cited by Bower (petition, p. 8) apparently deals with a surety contract—not a labor agreement—in which the two parties agreed that "any dispute . . . *shall* be determined" by arbitration. That decision appears to stand for the proposition that an agreement to submit all controversies to arbitration will be enforced. That principle has no applicability to a case such as this where the statute simply provides (Section 204) that disputes "*may* be referred" to the Adjustment Board, and where the courts have universally held that there is no requirement that disputes be submitted to the Adjustment Board.

Lodge No. 19 v. *Svi Sveti,* 323 Pa. 292, 185 Atl. 650 (1936) involves *internal disputes* within a *fraternal association* and has no bearing whatsoever on employment contracts. However, even in the field of fraternal associations the Pennsylvania court recognized the binding effect of a decision by the highest intra-association tribunal as follows (323 Pa. 294):

> "This adjudication by the highest tribunal of the society is decisive of their rights, once it is determined that the laws of the society were strictly complied with, and that the officers acted reasonably and in good faith. Under such circumstances, this court will not go into the merits of the case . . ."

Glen Alden Coal Co. v. *Unemployment Compensation Board,* 168 Pa. Superior Ct. 534, 79 A. (2d) 796 (1951) cited by Bower as "Glenolden Coal Co." (Bower's petition,

p. 9), deals with rights under an unemployment compensation statute, not under an employment agreement, and it stands for the proposition that one who is discharged in violation of a contract is not unemployed within the meaning of an unemployment compensation statute since he has the right to reinstatement or damages. The Pennsylvania court held that, before the discharged employee could obtain unemployment compensation, he must exhaust any contractual appeal remedies and, if there were none, any available court action for damages. The court had no occasion to rule on what, if any, administrative remedies must be exhausted before court action for damages could be brought, and, indeed, the implication is that the availability of any administrative remedy might preclude a judicial remedy. As the court said (168 Pa. Superior Ct. 537):

> "The case, we think, comes to this: If the alleged agreement between the Union and appellant is properly established claimant will be remitted to the remedies, if any, provided by the agreement or, *lacking such contractual remedies,* to his action at law." (Italics supplied.)

Thus, even if Pennsylvania law were deemed to be applicable to a collective bargaining agreement executed in Florida between a Delaware corporation with headquarters in New York and Florida and a labor union with headquarters in Chicago, dealing with services of Bower rendered in interstate commerce between New Jersey and Florida, there is no basis for Bower's claim that the decision of the lower court violates the principles of the *Koppal* case, the *Moore* case or *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938). If the Pennsylvania decisions can be construed as requiring any exhaustion of administrative remedies in cases such as this, they clearly do not require more than "an unqualified dismissal that is no further reviewable *within the employer's organization.*" (See opinion of Court of Appeals, Bower petition, p. 22.)

There is serious doubt whether state law reasonably could require, as a mere *preliminary* to court action, resort to a tribunal whose decision under a valid federal law regulating commerce is "final and binding." That doubt need not be resolved in this case, however, since there is no applicable state law purporting to make such a requirement.

It follows that Bower has more than exhausted his "administrative remedy" within the meaning of the *Koppal* case—he has exhausted his *entire* remedy by having submitted his case for "final and binding" decision by the Adjustment Board. Since the decision of the Court of Appeals is in harmony with the decisions of the Supreme Court in the *Koppal* case, the *Moore* case and the *Erie R.R.* case, there is no reason for this Court to grant certiorari as requested by Bower.

II.

Bower's action is not one for "judicial review," and in any case the Adjustment Board's decision is not subject to judicial review.

Bower's petition (p. 3) states one of the questions at issue as being whether the decision of the Adjustment Board is "subject to judicial review." Such is an inaccurate statement of the issue in view of the fact that Bower did not seek judicial review, but rather sought to ignore the decision of the Adjustment Board, referring to it solely for the purpose of showing that Bower "exhausted his administrative remedies."

The Court is not requested by Bower to do anything with respect to the Adjustment Board decision—either to set it aside or to amend it or to remand it to the Adjustment Board for further action. Instead, Bower seeks to have the Court *ignore* the Adjustment Board decision and give Bower in this *independent* action (a) reinstatement and (b) back pay.

If this were intended to be a proceeding for judicial review (and it will be demonstrated later herein that such a proceeding could not be maintained), it clearly should make the administrative agency (the Adjustment Board and its members) a party defendant so that the Court could direct the Board to amend its order in accordance with the Court's findings, and the prayers for relief should be addressed to the Board's decision rather than to an independent finding and judgment by the Court. See for example, *Futhey* v. *Atchison, T. & S. F. Ry.*, 96 F. Supp. 864, 866 (N. D. Ill., 1951) where the complaint alleged that the award of the Adjustment Board was "contrary to fact and contrary to law" and prayed "that the award be vacated and set aside and that defendant Board be directed to grant plaintiff a rehearing."

That some such form of proceeding would be necessary if an action for judicial review of the Board's decision were to be maintained is apparent from the decision in *Kirby* v. *Pennsylvania R.R.*, 188 F. (2d) 793, 796-797 (C. C. A. 3d, 1951), which was an action to *enforce* an Adjustment Board award, such action being specifically authorized by the Act. The Court there said (Footnote 11):

> "The only power given the court is to 'enforce or set aside the order of the * * * Board.' 45 U. S. C. A. §153, First (p). To this extent the proceeding is like an action on a judgment. *The Court cannot shape a new order.*" (Italics supplied.)

This action plainly must fail as a proceeding for judicial review inasmuch as the Court could not "shape a new order" on its own initiative, and has not been asked to take any action which would require the Adjustment Board to hold further hearings or to prepare a new or different order.

That a collateral attack on the Adjustment Board decision is not maintainable is clearly set out in *Railroad Yardmasters of North America* v. *Pittsburgh & L. E. R.R.*, 39 F. Supp. 876 (N. D. Ohio, 1940).

It may be noted that the decision in the *Railroad Yardmasters of North America* case was cited with approval in *Washington Terminal Co.* v. *Boswell, supra,* 124 F. (2d) at 250, and of course the substance of that decision has been adopted in all of the cases cited above which hold that the prosecution of a claim before the Adjustment Board is a binding election of remedies.

Since this action does not seek review, reversal or remand of the Adjustment Board decision, it is an unsupported and extra-legal collateral attack on that decision, and cannot be maintained.

All of the decisions with respect to election of remedies which are cited above demonstrate that "judicial review" is not available with respect to decisions of an Adjustment Board *adverse* to the employee. Some of those cases refer specifically to the absence of judicial review, while others speak only in terms of election of remedies as precluding the right to maintain an action in court. It is evident that the different forms of expression amount to the same thing—the court has no jurisdiction of a disgruntled employee's claim after he has submitted it to an Adjustment Board and has received an adverse decision.

The absence of judicial review for an Adjustment Board decision is strongly indicated in many decisions of the Supreme Court. As pointed out by this Court in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305-306 (1943), Congress was "highly selective" in the manner in which it "provided for judicial review of administrative orders or determinations under the Act." Such selectivity, as pointed out by the Court, was apparent in the provision for suits to *enforce* Adjustment Board awards (Section 3, First (p)), and the provision for judicial review of arbitration awards under some circumstances (Section 9). As stated by the Court, "When Congress in §3 and in §9 provided for judicial review of two types of orders or awards and in §2 of the same act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history

of the Act that that distinction was not inadvertent." See to the same general effect *General Committee* v. *Missouri-K-T R.R., supra; General Committee* v. *Southern Pacific Co., supra.*

Having in mind the admonition of this Court that "the command of the Act shall be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied" (*General Committee* v. *Missouri-K-T R.R.*, 320 U. S. 327), where is the "explicit command" and the "plain" purpose to provide judicial review of an Adjustment Board decision adverse to the employee? There is no such command or purpose. On the contrary, the "plain line of distinction" drawn by Congress between favorable and unfavorable Adjustment Board decisions demonstrates beyond doubt that no judicial review was provided for decisions unfavorable to the employee.

Section 3 First (o) of the Act provides in part that "in case of an award . . . *in favor of petitioner,* the . . . Board shall make an order, directed to the carrier, to make the award effective. . . . " (Italics supplied.)

Section 3 First (p) then provides that "If *a carrier* does not comply with an order . . . *the petitioner, or any person for whose benefit such order was made,* may file in the District Court . . . for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the *order* of the . . . Board. . . . Such suit . . . shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the . . . Board shall be prima facie evidence of the facts therein stated, and . . . the petitioner shall not be liable for costs . . . unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The District Courts are empowered . . . to make such order

and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the . . . Board." (Italics supplied.)

Section 3 First (q) provides that any such action must be brought within two years from the time that the cause of action accrued under the Board's award.

All of these provisions apply where the Adjustment Board decision *favors* the petitioner. But what if the decision is adverse? Where is the provision for judicial relief? The answer is that there is none.

If one were to seek to bring an action for judicial review of an Adjustment Board decision *adverse* to the employee, he would immediately be met with the following problems as to which Congress has provided no guidance and no procedure:

(1) There is no "order" to appeal from, since Congress has required an "order" only where the award is "in favor of petitioner."

(2) There is no provision as to venue, since Congress has provided for venue only as to suits to *enforce* an award.

(3) The plaintiff cannot attach an "order" to his petition, since the Adjustment Board is not required to make one.

(4) There is no provision as to the effect, if any, to be given to the Adjustment Board's findings—*i.e.* whether they are to be deemed "prima facie evidence" or conclusive.

(5) There is no provision as to assessing and paying costs.

(6) There is no provision for attorney's fees if plaintiff is successful.

(7) The court is not empowered to act by "mandamus" or otherwise with respect to the Adjustment Board's decision.

(8) There is no period of limitations within which suit must be brought.

Clearly, if Congress had intended the courts to review Adjustment Board decisions *adverse* to employees, it would have provided answers to all of such problems. A very simple provision would have required the Adjustment Board to issue an "order" in every case and would have permitted any person to obtain judicial review or enforcement of that order. Congress deliberately chose not to make judicial review generally available in that manner, but permitted recourse to the courts only as to decisions *favoring the employee.*

"And the inference is strong . . . that that distinction was not inadvertent." *Switchmen's Union* v. *National Mediation Board, supra.*

At the time of the passage of the Administrative Procedure Act (5 U. S. C. 1001) Congress made doubly clear its intention that judicial review of decisions of the Adjustment Boards should not be available except in the single specific instance provided in the Act (*i.e.*, enforcement of an award favorable to the employee). Section 2 (a) of that Act specifically excludes from the definition of "agency" (except as to the public information requirements of Section 3) any "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." That exclusion was directed primarily to the Adjustment Boards. As pointed out by the Report of the House Judiciary Committee (Senate Document 248, 79th Congress, 2nd Session, 1946, page 253):

> "This excludes from all but the public-information provisions of section 3 such agencies as the National Railroad Adjustment Board and the Railroad Retirement Board. Other boards so composed under the Railway Labor Act or like statutes would also be exempt. In such cases *the exclusion from the bill is total,* save for section 3." (Italics supplied.)

See to the same effect Senate Document 248, page 355. The purpose of the exclusion of the Adjustment Boards was stated to be that such agencies "tend to be arbitral or mediating agencies" (Senate Document 248, page 196), and therefore were not thought to be properly subject to judicial review.

The effect of the "total" exclusion of the Adjustment Boards (including those formed pursuant to Title II of the Railway Labor Act) was to except the decisions of such agencies from the judicial review provisions of Section 10 of the Administrative Procedure Act. This is true since Section 10 provides judicial review only as to "any agency action" and since the Adjustment Boards were specifically defined as not being agencies, their actions were not subjected to judicial review.

It should be noted that the action of Congress in excluding the Adjustment Boards from the judicial review provisions of the Administrative Procedure Act took place after several of the judicial decisions holding that only *enforcement* of Adjustment Board decisions is subject to judicial review. The careful exclusion by Congress of the Adjustment Boards from the operation of the Administrative Procedure Act therefore must be deemed to be a very clear expression of the intent of Congress that review should not be afforded except where specifically provided in the Railway Labor Act.

The distinction between favorable and unfavorable Adjustment Board decisions is entirely reasonable and must have been intended by Congress. The employee is the one who demands reinstatement for damages. He is the one who has the option to sue in court or to press the matter to decision before the Adjustment Board. He is not *required* to take his case to the Adjustment Board. See the *Michel* case and others, *supra*. Therefore, if the decision which he elects to demand from the Adjustment Board is unfavorable to him there is every reason why he should be bound by it and should no be allowed to retry the case in court.

The carrier's situation is quite different, as it was the defendant at all times and had no option as to whether the case should be tried before the Adjustment Board or in court. It was forced to accept the election of the employee as to the forum, even though it might have been badly inconvenienced or prejudiced by the choice. The carrier, therefore, is reasonably entitled to whatever small consolation it may derive from the fact that it may be able to force the case into court by refusing to comply with the Adjustment Board decision. It should be emphasized that the carrier's judicial remedy is hazardous and tenuous. If it refuses to comply with the award, it faces a possible strike in lieu of judicial action, and if suit is brought it may be delayed as much as two years during which time the damages accumulate and may become enormous, and the carrier in the suit must overcome the strength of the employee's "prima facie" case made out by the Adjustment Board decision.

Because of the great risk involved in the carrier's reliance on its judicial "remedy," carriers have repeatedly sought declaratory relief, which has been uniformly denied. *Washington Terminal Co.* v. *Boswell, supra; New Orleans Public Belt R.R. Commission* v. *Ward,* 182 F. (2d) 654 (C. C. A. 5th, 1950).

Clearly there is no unjust discrimination against employees when they have the choice of forum and at all times are in control of the course which the action will take while the carrier must accept the employee's choice and can obtain judicial review only at great financial risk and by assuming the burden of proof.

Any suggestion that the provision of judicial review only in *enforcement* cases is unjust or unconstitutional is adequately met in the *Michel* decision, *supra* (188 F. (2d) 227).

It has been recognized from the earliest history of the Railway Labor Act that no judicial review was provided with respect to an adverse decision of the Adjustment Board. Thus, Dean Lloyd K. Garrison wrote in February

1937 ("The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567, 591): "The statute gives no right of appeal to either carriers or unions from an adverse decision of the Board." Dean Garrison further pointed out that the judicial remedy (enforcement) given to employees with respect to *favorable* rulings was not commonly used, as "economic pressure" was the remedy preferred by the unions. Thus, although the Act might appear on its surface to give the employer a judicial remedy (defending an *enforcement* suit), the fact is that he has no remedy unless the unions choose to bring the case into court.

It is submitted that the statutory intent is plain to deny judicial review of an *adverse* Adjustment Board decision, and that the pattern of the Act is fair and entirely constitutional.

The language of Mr. Justice Frankfurter, speaking for four members of the Supreme Court in the *Burley* case, *supra*, is worthy of fuller quotation (325 U. S. 760-761):

> "Since the claim before the Adjustment Board was for money, there remains the question whether its disposition was open to judicial review. The Railway Labor Act commands that the Board's 'awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' Section 3, First (m). But the determination here in controversy does not 'contain a money award' so as to be excepted from the final and binding effect given other awards. The obvious meaning of 'money award' is an award directing the payment of money, not one denying payment. See Berryman v. Pullman Co., D. C., 48 F. Supp. 542. We are pointed to no aids in construction that should withhold us from giving the familiar term 'money award' any other than its ordinary meaning as something that awards money. This construction is confirmed by comparison with the provisions of the Interstate Commerce Act dealing with reparation orders. Since both Acts came out of the same Congressional Committees one finds, naturally

enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission. Compare Railway Labor Act, §3, First (p) with Interstate Commerce Act, as amended by §5 of the Hepburn Act, 34 Stat. 584, 590, 49 U. S. C. §16(1), (2), 49 U. S. C. A. §16 (1, 2). If a carrier fails to comply with a reparation order, as is true of non-compliance with an Adjustment Board award, the complainant may sue in court for enforcement; the Commission's order and findings and evidence then become prima facie evidence of the facts stated. But a denial of a money claim by the Interstate Commerce Commission bars the door to redress in the courts. Baltimore & Ohio, R. Co. v. Bardy, 288 U. S. 448, 53 S. Ct. 441, 77 L. Ed. 888; Interstate Commerce Comm. v. United States, 289 U. S. 385, 388, 53 S. Ct. 607, 609, 77 L. Ed. 1273; Terminal Warehouse v. Penn. R. Co., 297 U. S. 500, 507, 56 S. Ct. 546, 548, 80 L. Ed. 827.

"The Railway Labor Act precludes review of the Board's award; and, since authorization of the Brotherhood officials to make the settlement is not now open to judicial inquiry, the judgment calls for reversal."

Two factors should be reemphasized with respect to such language: (1) The majority of the court did not take issue with the minority's conclusion that judicial review is not available—the majority simply held that the Adjustment Board did not have jurisdiction because no duly authorized representatives of the employees had prosecuted the claim (an objection not available in Bower's case) and therefore the employees had not elected to accept the Adjustment Board remedy; and (2) Within two and one-half months after the Supreme Court finally decided the *Burley* case on rehearing (327 U. S. 661, March 25, 1946), Congress passed the Administrative Procedure Act (Approved June 11, 1946) making it entirely clear that decisions of the Adjustment Board should not be subject to judicial review

except in an enforcement proceeding as specifically set forth in the Railway Labor Act.

Certainly if Congress had intended to provide judicial review for all Adjustment Board decisions, or had intended to grant any review beyond that inherent in an enforcement proceeding (or in a proceeding to determine if the Adjustment Board had *jurisdiction*) it would have made its purpose clear in the Administrative Procedure Act instead of confirming the contrary intent by expressly *excluding* Adjustment Boards from the judicial review and other provisions of the Administrative Procedure Act.

In the same connection, the following language of Mr. Justice Rutledge in the *Washington Terminal Company* case, *supra,* is significant (124 F. (2d) 245-246):

> "When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. . . . The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

While Mr. Justice Rutledge left open the question whether the Act would be deemed constitutional if the employee were denied review of an adverse Board ruling, that question has since been resolved in the affirmative by *Switchmen's Union* v. *National Mediation Board,* the clear implications of the *Burley* case, the *Michel* case, and the numerous other decisions cited above holding that the election by the employee of the Adjustment Board remedy is final and binding and may not be disturbed by court action.

Perhaps the most direct authority for the proposition that an adverse decision of the Adjustment Board may not be reviewed by a court is the decision of Judge Igoe in *Futhey* v. *Atchison, T. & S. F. Ry., supra.* The *Futhey* case is a holding that, even where the Adjustment Board is *plainly wrong,* having failed to take into account facts which the court knows or assumes to be true, the court

has no jurisdiction to review the decision even to the extent of ordering a new trial by the Adjustment Board.

Bower has made no such showing. His only contention is that the Adjustment Board was "arbitrary," which amounts to a mere assertion that the decision is erroneous. Such a general conclusion of law is insufficient to withstand a motion for summary judgment, as the lower courts properly held. See *Washington* v. *Maricopa County*, 143 F. (2d) 871 (C. C. A. 9th, 1944); *Walling* v. *Fairmont Creamery Co.*, 139 F. (2d) 318 (C. C. A. 8th, 1943). Defendant's affidavits assert—and they are undisputed—that Bower presented all facts and arguments to the Adjustment Board which he has presented to the court. The Adjustment Board decision is therefore final as to both law and facts, and this represents an *a fortiori* case for application of the doctrine of the *Futhey* case.

Bower's petition in this Court asserts that the proceedings in the administrative stage were "irregular" and that the Board received and considered charges which were non-existent at the time Bower was discharged. He further alleges that hearsay and opinion testimony was received. Such charges are not sustained by the portions of transcript of the administrative hearing which Bower has chosen to print in his appendix. Moreover, they are not supported by the other portions of the administrative record. The entire record was submitted to the trial court, and Judge Kirkpatrick evidently concluded that Bower was given a satisfactory hearing. As stated by the Court of Appeals (Bower's petition, p. 20), "the district court concluded that Bower had received full and fair consideration at the hands of the System Board and was bound by its decision."

This Court obviously cannot hold contrary to the conclusion of Judge Kirkpatrick inasmuch as Judge Kirkpatrick saw the entire administrative record and Bower has not seen fit to print any materials which he claims support his extravagant charges.

The insufficiency of Bower's allegations is demonstrated by the action of the court in *Hartley* v. *Pan American Airways, Inc., supra,* in dismissing a complaint with substantially stronger allegations (98 F. Supp. 248):

> "Plaintiff, in order to establish jurisdiction in this Court, has attacked the award of the Railroad Adjustment Board on the asserted ground that the '• • • statements were and are false and untrue and constituted fraud upon the Board of Adjustment,' with respect to the reasons for defendant's failure to obtain plaintiff's passport. It is defendant's position that such allegation, as a ground for impeaching the award of the Board of Adjustment, is insufficient. It is merely a contention that the Board acted erroneously in believing certain testimony before it and disbelieving other testimony relied upon by plaintiff in seeking to make out a case. Such point is well taken. Firemen's Fund Insurance Co. v. Flint Hosiery Mills, 4 Cir., 74 F. 2d 533, 104 A. L. R. 556; In re Cummings, D. C., 84 F. Supp. 65."

A final point with respect to the *Slocum* case may be in order. In that case the Supreme Court held that a discharged employee could bring an action in court for damages if "he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee." On the other hand, the implication is clear that the employee could not go to court if he demanded reinstatement because that would "involve questions of future relations between the railroad and its other employees" (339 U. S. 244), and decisions as to such matters should be made by the Adjustment Board in order to provide "a reasonable degree of uniformity in the interpretation of agreements."

Such reasoning requires denial of judicial review *after* and Adjustment Board decision just as strongly as it requires judicial abstention *before* the Adjustment Board acts. Certainly no uniformity will result if Adjustment

Board decisions are to be upset in *de novo* trials in various courts throughout the country (jurisdiction being obtainable presumably in any of the twenty-four states in which Eastern operates).

This is the type of case which this Court held should be decided finally by the Adjustment Board in the interest of harmony in future relations between the employer and employees. Many provisions of the collective bargaining agreements must be considered and interpreted in order to decide Bower's complaint. The agency which is most familiar with those agreements and the years of operations thereunder has considered those provisions and has given due weight to the interpretations advanced by Bower and those advanced by the defendant. That agency has reconciled the conflicting interpretations and all possible constructions in the way which it (representing both the employer and all employees in the class or craft) deems best in the light of past practice and future relations.

Considering the purpose of the Act, as explained by the Supreme Court in the *Slocum* case and the other cases discussed above, it is plain that the Court could not now intervene to give a different interpretation of the agreement, or even to decide whether the Adjustment Board's decision is correct. That decision, by agreement of the parties and Bower's voluntary submission, is "final and binding" and there is no occasion for judicial review.

That is not to say that a court may never examine an Adjustment Board decision. Aside from the enforcement cases, the decisions hold that the courts may inquire whether the Board had jurisdiction—*i.e.*, whether the employee submitted the case through an authorized representative (*Burley* case, *supra*), or the employee had notice of the hearing (*Brotherhood of R. T.* v. *Templeton*, 181 F. (2d) 527 (C. C. A. 8th, 1950), or whether the members of the Board ostensibly representing the employee had an economic interest adverse to the employee and therefore in fact represented his opponents (*Edwards* v. *Capital Airlines*, 176 F. (2d) 755 (App. D. C. 1949)), etc.

Bower relies heavily on *Edwards* v. *Capital Airlines, supra,* claiming that there is a conflict between that decision and the decision of the Court of Appeals in this case. There is no such conflict. The *Capital Airlines* case holds in net effect that an adjustment board lacks jurisdiction to make a final and binding decision where there is an active conflict of economic interests between the employee whose case is to be decided and the union representatives on the adjustment board. The Court stated (176 F. (2d) 762):

> "We mean to make this decision no broader than the case. We are fully conscious that implications of more general doctrines seem to appear. But other holdings can await other cases. To emphasize the narrow limits of our present ruling, we point out that we are not dealing with a case where there was merely a dispute between a company and its employees, in which the union represented the employees; or with one in which the union assumed a bona fide neutral position in a dispute between employees. This case, we repeat for emphasis, concerns the rights of a few non-members of the union in a proceeding in which the union aggressively presented and pressed the claims of its members adverse to the claims of these appellant non-members, under a contract negotiated by the union, and before a board upon which two of the four members were union representatives. The nub of the question is whether such a contract can make the award of such a board in such a proceeding immune from judicial examination. We hold that it cannot."

Here there is no claim of conflict between the interests of the majority of the pilots and the interests of Bower. While the union did not represent him in his claim against Eastern, there is nothing to indicate that the union did not occupy "a bona fide neutral position" or did not, for that matter, sympathize with his attempts to be reinstated.

It is clear from the reasoning in the *Capital Airlines* case, that the Court which decided that case would have held the decision of the Adjustment Board in Bower's case to be "final and binding."

A further important distinction between the *Edwards* case and this one is that here Bower prosecuted the grievance himself and voluntarily made the election to submit the case to the Adjustment Board, whereas in the *Edwards* case the union made the election on behalf of the majority of the pilots, and the two minority pilots had no voice in submitting the case to the Adjustment Board and at no time consented to having their rights determined finally by the Adjustment Board. Clearly the doctrine of election of remedies cannot be applied to one who has never elected a remedy. See *Carner* v. *Union Pacific R.R.*, 22 Labor Cases 67,109 (D. Neb., 1952) where the Court held that prior action of the *employer* in submitting a dispute to the Adjustment Board did not waive the right of *the employee* to elect his judicial remedy.

In short, the *Capital Airlines* case stands for the proposition that a court may investigate an adjustment board proceeding to the extent necessary to determine whether the board had jurisdiction and whether the employee actually elected to be bound by its decision.

The decision of the Court of Appeals in this case fully accords with the decision in the *Capital Airlines* case. As the Court of Appeals stated in this case (Bower's petition, p. 23):

> "This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceeding, even when these issues are raised collaterally. In this case, perhaps anticipating that we might approve a collateral challenge restricted to the jurisdiction of the Board and the essential fairness of its procedure, Bower has alleged generally that the Board's decision was arbitrary. But examination of his specific claims as shown by his supporting affidavits and his arguments shows that he is really talking

about alleged mistakes of law and erroneous evaluation of evidence. In substance he asserts that the administrative procedure was irregular in certain of its details, that irrelevant matter was considered by the Board, that hearsay was received, and that his own conduct of which Eastern complained was not serious enough to justify his dismissal. The district court refused to consider objections of this sort. Instead, and properly, it confined itself to such inquiry as was necessary to determine whether the Board had given the plaintiff a full and fair hearing and had exercised its honest judgment in reaching its conclusions and decision on the full record."

The authorities hold with extraordinary unanimity that, where the Adjustment Board has jurisdiction, its decision is "final and binding" as provided in the Act, and the court may not review it or set it aside. See not only the cases cited in this Section of this brief, but also those relative to "election of remedies" in Section I—decisions which clearly express the views of courts that neither judicial review nor any other form of judicial action is lawful after an adverse Adjustment Board decision in which the Adjustment Board had jurisdiction. There is no conflict on this point.

Bower now suggests that the decision of the Adjustment Board is comparable to an arbitration award, and he apparently concludes that the Court therefore has broader power to review that decision because of such comparability. However, it is apparent that decisions on arbitration awards will not assist Bower's case. See *Philadelphia Housing Authority* v. *Turner Construction Co.*, 343 Pa. 512, 517, 23 A. (2d) 426 (1942), in which the court stated as follows:

"We held in the recent case of Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385, 196 A. 43, that the Arbitration Act of 1927 did not entirely displace arbitration under the common law. To the same effect are Isaac v. Donegal & Conoy Mutual

Fire Ins. Co., 301 Pa. 351, 152 A. 95; P. O. S. of A. Hall Asso. v. Hartford Fire Ins. Co., 305 Pa. 107, 157 A. 259; Pierce Steel Pile Corporation v. Flannery, 319 Pa. 332, 179 A. 558.

"A summing up of our cases leads us to the conclusion that if the arbitration is at common law an award will be confirmed, because the arbitrators are the final judges of both law and fact."

Thus, if this case were regarded as a common law arbitration, the award would be final and binding and not subject to judicial review. Indeed, it appears that a principal reason why National Railroad Adjustment Board decisions have been held to be final and binding is that, by voluntarily submitting his claim to the Board, an employee is deemed to have agreed or contracted that the decision would be "final and binding" in accordance with the statutory language. As stated in the *Kelly* case, *supra* (75 F. Supp. 739), when an employee voluntarily submits his claim to the Adjustment Board "he thereby is obligated to abide by its terms in the same manner as if he had contracted so to do." Here plainly Bower "contracted" to abide by the terms of the decision of the Adjustment Board inasmuch as the agreement under which he submitted his claim to the Adjustment Board provided that its decision would be "final and binding."

See the following additional authorities to the effect that arbitration awards cannot be impeached for errors of law or fact:

Burchell v. *Marsh*, 17 How. (U. S.) 344 (1855);
The Hartbridge Case, 62 F. (2d) 72 (C. C. A. 2d, 1932), cert. denied, 288 U. S. 601 (1933);
United Fuel Gas Co. v. *Columbian Fuel Corp.*, 165 F. (2d) 746, 751 (C. C. A. 4th, 1948) and the cases there cited.

As was said in the *United Fuel Gas Company* case, *supra*, "We cannot say that the arbitrators misinterpreted the contract or that they considered improper evidence in mak-

ing their award; but, had they done so, this would not vitiate the award."

It is submitted that Bower's allegations concerning the Adjustment Board award boil down to a simple charge that the Board's decision was wrong as a matter of law. The Court has no duty to review any such alleged error.

Bower likewise says that the hearing officials designated by the Company were not impartial or disinterested. But the Act does not contemplate that they will be impartial and, on the contrary, the Act contemplates and even requires that they be appointed by parties to the controversy. Plaintiff knew of their relationship to the Company in advance of his final election to submit the case to them for decision (see Eastern's Appendix, p. 14a), and yet he voluntarily submitted the case to them knowing that their decision would be "final and binding" under the contract. Bower's counsel stated before the Adjustment Board (Bower's Appendix, p. 32a): "I do not assume that your Board is partisan, either for company or pilot; I assume your Board is just a board of impartial arbitrators, so to speak. It is true that two of you are from the company and two of you are from the Pilots Association; but I take it that you are divested of your background and your own jobs and that you are here impartially to weigh the case in accordance with the law and the facts." When that was said, Bower and his counsel knew everything which Bower now alleges as indicating bias or irregularity. Thus, Bower has waived any objection which he might otherwise be deemed to have. See 6 C. J. S., Arbitration and Award, Section 104 (d) where it is stated that "where a party having knowledge of fraud, misconduct or partiality allows the arbitrators to proceed without objection on that account, he is deemed to have waived the objection." And see the following authorities to the effect that partiality and bias cannot be used to impeach an arbitration award where the party complaining knew of the circumstances indicating bias or prejudice and did not object on that ground:

Chicago, R. I. & P. Ry. v. *Union Pacific R.R.*, 254 Fed. 235, 238 (C. C. A. 8th, 1918);
San Carlo Opera Co. v. *Conley*, 72 F. Supp. 825, 833 (S. D. N. Y., 1946);
W. E. Hedger v. *James Richardson & Sons*, 26 F. Supp. 11, 12 (E. D. N. Y., 1938).

As was said in the *San Carlo Opera* case, *supra*:

> "Where a party to an arbitration has knowledge of facts possibly indicating bias or prejudice on the part of an arbitrator he cannot remain silent and then later object to the decision of the arbitrators on that ground. His silence and inaction constitute a waiver of the objection. Chicago, Rock Island & P. R. Co. v. Union Pacific R. Co., 8 Cir., 254 F. 235."

Bower cites *Seaboard Surety Company* v. *Commonwealth*, 345 Pa. 147, 153, which obviously is inapplicable since it relates to an arbitration under the Pennsylvania Act of 1927, which could not be pertinent with respect to a contract entered into in Florida between a Delaware corporation (Eastern) and an unincorporated association with headquarters in Chicago (the Air Line Pilots Association). Therefore, the decision in the *Philadelphia Housing Authority* case, *supra*, is the one which would be applicable to this case if the Adjustment Board's decision were treated as an arbitration award.

It follows from the foregoing that Bower is not entitled to judicial review of the Adjustment Board award on the basis of authorities applicable to such awards under the Railway Labor Act or on the basis of authorities dealing with arbitration awards.

CONCLUSION

From the foregoing discussion it is apparent that Bower elected his remedy before the Adjustment Board and is bound by the decision of that Board which is adverse to him, and that the Court has no authority under the Railway Labor Act to review that decision.

As the Court of Appeals stated (Bower's petition, p. 22):

> "Whether we say that the party is bound by his own voluntary election between an administrative and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case."

There is no conflict between the decision of the Court of Appeals in this case and the decisions of this Court in *Transcontinental & Western Air* v. *Koppal, Moore* v. *Illinois Central Railroad,* and *Erie R.R.* v. *Tompkins,* inasmuch as the state law relied on by Bower did not require Bower to resort to the Adjustment Board before bringing court action, and the previous holdings of this Court are in harmony with the unanimous rulings of other courts to the effect that an employee who obtains an adverse decision by an Adjustment Board is bound by his election of remedies and by that decision.

Likewise, there is no conflict between the decision of the Court of Appeals in this case and the decision in *Edwards* v. *Capital Airlines,* as the latter case and all other court decisions on the same point hold that a court may examine adjustment board decisions adverse to the appellant only to the extent necessary to detect possible jurisdictional defects, and cannot review such decisions on the merits.

While this Court has not directly decided that judicial review is not available with respect to Adjustment Board decisions adverse to the party who elected the Adjustment Board remedy, there is no conflict among the many federal and state courts which have ruled on the question, and therefore there is no need for a decision by this Court.

It follows that the decision of the Court of Appeals is correct and the petition for certiorari should be denied.

Respectfully submitted,

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